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In The Supreme Court of the United States

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CAROLE R. SQUIRE,

Petitioner,

v.

CHRISTOPHER J. GREER; BOARD OF ELECTIONS OF FRANKLIN COUNTY, OHIO,

Respondents.

◆

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO**

◆

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

◆

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QUESTIONS PRESENTED

As was pointed out in the Petition recently presented to this court in Wexler v. Florida, Eleventh Circuit, Case No. 04-16280 (2006), after the events that gave rise to Bush v. Gore, 531 U.S. 98 (2000) states, including Ohio, with federal encouragement purchased new voting mechanisms to overcome problems associated with the older equipment. In Ohio, as in many states, the Legislature statutorily prescribed mandatory minimum acceptable technological standards that purchased equipment must satisfy in order to assure that votes cast on electronic voting systems are counted, and counted accurately. The question presented in this Petition, is whether the intentional use by a state board of elections of a statutorily deficient and error prone voting system in an election deprives voters of their due process right to have their votes counted accurately as determined by the United States Court of Appeals in Stewart v. Blackwell, 444 F.3d 843 (6th Cir. 2006) or is it a mere election irregularity as determined by the Ohio Supreme Court in Squire v. Geer, 117 Ohio St. 3d 506 (2008).

The Ohio General Assembly has enacted § 3506.05(B), Ohio Revised Code which prohibits use in any election of a voting system that has not been certified and approved for use by the Ohio Secretary of State. Certification is the process by which through testing and evaluation, an accredited voting system test laboratory validates that a voting system will perform properly in an election. See, United States Election Assistance Commission (USEAC)

Voting System Testing & Certification Program Manual, p. 17. Regulations implementing § 3506.05, provide that no voting system may be put in use unless it has been certified, within the meaning of, Ohio Administrative Code Section OAC § 111:3-3-01[1], In the election that is the subject of this request for review, the November 7, 2006 general election in Franklin County, Ohio, it is uncontested that a voting system was intentionally deployed that had not been certified in accordance with Ohio law, in that, county officials relied upon the system's manufacturer's claim, that an uncertified configuration of modules that compromised the voting system, would operate just as properly as the certified configuration. As a result, despite a lack of certification as required under Ohio law, a lawfully certified configuration of equipment was intentionally not used in the November 7, 2006 election by Respondent the Franklin County, Ohio Board of Elections.

Petitioner here, Carole R. Squire, an incumbent judge in Franklin County and candidate for reelection in 2006, challenged the outcome of the

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[1] OAC 111:3-3-01(c) states:

(C) No voting machines shall be approved by the board of voting machine examiners or certified by the secretary of state, or be purchased, rented, or otherwise acquired, or used, except when specifically allowed for experimental use, unless it fulfills the following requirements...

(15) The equipment has been certified by an independent testing authority as meeting or exceeding the minimum requirements of the federal election commission voting system standards.

2006 election on grounds that the use of an uncertified voting system rendered the outcome of the 2006 general election uncertain as a matter of law, for the reason, the rationale for certification of equipment is to obtain assurance that a voting system (in a specific configuration or configuration) has been tested to an identified set of voting standards including confirmation that the system accurately counts and tabulates votes and can be relied upon to perform properly in an election.

In its opinion overruling Petitioner's challenge to the November 2006 election, the Ohio Supreme Court stated "the use of a configuration of [voting machine] modules that was not certified by the Secretary of State or United States Election Assistance Commission" constitutes a mere election irregularity requiring an additional showing that the irregularity effected enough votes to change or make uncertain the election result. Petitioner had argued that the use of an uncertified system affects all votes cast for the reason unless a system has been validated to properly count votes, uncertainty exists as to whether it does.

The questions presented are:

1. Whether it is a federal due process violation for the Ohio Supreme Court to trivialize the county's intentional imposition on eligible voters of a voting system less likely to assure that their votes are counted accurately than votes cast on a certified system.

2. Whether despite the Ohio Supreme Court's trivialization as a mere irregularity, use of an uncertified voting system in an election is a violation of the due process guarantee against any election practice that arbitrarily denies the right to vote by placing an unlawful burden or encumbrance on that right.

3. Whether the use of an error prone voting system deprives voters of their due process right to have their votes counted accurately.

PARTIES

Petitioner is Carole R. Squire, a former judge on the Franklin County Court of Common Pleas, Division of Domestic Relations and Juvenile Unit. Mrs. Squire was a candidate for reelection in the Ohio November 7, 2006, general election. Respondents are Christopher J. Geer, the person declared the winner of the 2006 election and the local Board of Elections in Franklin County, Ohio.

These parties are identical to those who were before the Ohio Supreme Court.

A Supreme Court Rule 29.6 disclosure statement is not required with this Petition.

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IN THE
SUPREME COURT OF THE UNITED STATES

CAROLE R. SQUIRE,
PETITIONER

v.

CHRISTOPHER J. GEER AND THE BOARD OF ELECTIONS OF FRANKLIN COUNTY, OHIO,

RESPONDENTS.

Petition for a Writ of Certiorari to the
Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

Carole R. Squire respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court in this case.

OPINIONS BELOW

The decision of the Ohio Supreme Court (App., infra, 1a is reported at 117 Ohio St. 3d 506. The opinion of the Franklin County Court of Appeals and its Magistrate, Joel F. Sacco, were unreported.

Denial of a Petition for Reconsideration was entered on June 4, 2008.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on April 2, 2008. A Motion for the Reconsideration was denied on June 4, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(SEE APPENDIX)

The Fourteenth Amendment to the United States Constitution is reproduced at 66a.

The relevant portions of the applicable Ohio statutes, Ohio Rev. Code. Ann. 3506.05, 3506.10, 3515.08, 3515.09, 3515.13, 3515.14, 3515.15 and Ohio Administrative Code 111:3-3-01 are reproduced at 67a-91a.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

This is an appeal from a judgment denying an election contest. The Ohio Supreme Court determined that despite the use of an uncertified voting system, by Respondent Board of Elections, Petitioner failed to establish by clear and convincing evidence that this failure affected enough votes to change or make uncertain the election result.

On November 7, 2006, an election was held in Franklin County, Ohio, to elect a candidate to the office of judge of the Franklin County Court of Common Pleas, Domestic Relations Division and Juvenile Branch, for the term commencing January 5, 2007. The candidates were Petitioner, Carole R. Squire,[1] and Respondent, Christopher J. Geer.

Respondent, Franklin County Board of Elections, conducted the official canvass of the election returns on November 27, 2006, and declared

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[1] On October 25, 2007, in a disciplinary proceeding, the Ohio Supreme Court suspended Squire from the practice of law for two years, with 12 months stayed on the condition that she commit no further disciplinary violations within the two-year period of suspension. Disciplinary Counsel v. Squire, 116 Ohio St. 3d 110, 2007-Ohio-5588, 876 N.E.2d 933. Squire has challenged this suspension as politically motivated, a violation of her right to due process of law and the federal and state whistle blowers statutes, 31 U.S.C. § 3730(h) and Ohio Revised Code § 4113.52. Mrs. Squire's challenge is currently pending in the United States District Court for the S.D. Ohio, Case No. 1:07-mc-53-SSB

Geer the winner by a vote 137,941 to 124,877, a margin of 13,064 votes.

1. Uncertified Voting System

In the November 7, 2006 election, the Board of Elections used iVotronic voting machines supplied by Election Systems & Software, Inc. (ES&S). In October 2006, the United States Election Assistance Commission provisionally certified the ES&S voting system "in its evaluated configuration." The evaluated configuration included the following module versions: (1) Election Data Manager – 7.4.4.0., (2) Hardware Programming Manager – 5.2.4.0., and (3) M100 Optical Scanner – 5.2.1.0. The versions of these modules used by the Board of Elections in the November 7, 2006 election were (1) Election Data manager – 7.4.3.0., (2) Hardware Programming Manager – 5.2.2.0., and (3) M100 Optical Scanner - 5.2.0.0. These versions had been previously certified at the federal and state level, although in different configuration.

"No voting machine, marking device, automatic tabulating equipment, or software for the purpose of casting or tabulating votes or for communications among systems involved in the tabulation, storage, or casting of votes shall be * * * put in use, or continued to be used * * * unless it * * * ha[s] been certified by the secretary of state * * *." R.C. 3506.05(B). "The secretary of state, in consultation with the board of voting machine examiners, shall establish, by rule, guidelines for the approval, certification, and continued certification of the voting machine, marking devices, and tabulating equipment to be used under Title XXXV of the Revised Code." R.C. 3506.06(H)(I). The secretary of state promulgated Ohio Adm. Code 111:3-3-01(C)(15), which requires voting equipment to have been "certified by an independent testing authority as meeting or exceeding the minimum requirements of the federal election commission voting system standards."

The trial court in this matter, the Franklin County Court of Appeals concluded, the board's use of a configuration of modules that was not certified by the secretary of state or the United States Election Assistance Commission constituted an election irregularity because it violated the pertinent statute and rule. The Court however adopted the recommendation of hearing Magistrate Joel F. Sacco, that despite the failure to use a certified system Petitioner had failed to show that enough votes were affected to render the outcome of the election uncertain.

The Ohio Supreme Court also found that Squire failed to establish that the Board's use of an uncertified voting system either changed or made uncertain the election result. These findings are repugnant to the Due Process Clause of the United States Constitution, hence this Petition.

B. COURSE OF PROCEEDINGS

This dispute involves an election contest timely commenced on December 22, 2006, under the provisions of § 3515.08, et seq. Ohio Revised Code. The Complaint in this matter requested that the result of the election conducted on November 7, 2006, for the office of Judge of Court of the Common Pleas, full term commencing January 5, 2007, be set aside and, among other things, that a recount under the provisions of § 3515.13, Ohio Revised Code, be conducted. Petitioner specifically alleged that the November 7, 2006, election was void ab initio for the reason the election was conducted on an uncertified electronic voting system, a violation of Ohio law and mandatory ground for invalidation of election results.

Petitioner, Carole R. Squire, was at all times herein a qualified and registered voter in Precinct 8-C, in the City of Columbus, Franklin County, Ohio. Petitioner and Christopher Geer, Respondent, were candidates for the office of Judge of the Court of Common Pleas, Full Term, commencing January 5, 2007, at the election held in Franklin County, Ohio on November 7, 2006. On November 27, 2006, Respondent Board of Elections of Franklin County (hereinafter "BOE"), an intervenor in this matter below, canvassed and declared that Chris Geer, was the successfully elected candidate by a vote of 137,941 to 124,877, a margin of 12,064 votes.

On January 18, 2007 the Honorable Joel F. Sacco was appointed magistrate without limitation of authority specified in Ohio Civil Rule 53(c) to conduct evidentiary proceedings concerning Petitioner's challenge.

An evidentiary hearing commenced on February 19, 2007. Petitioner presented the following unrebutted expert testimony at the hearing from renown electronic voting systems expert, Dr. Rebecca Mercuri.

The November 7, 2006 general election was the first general election in which Franklin County, Ohio utilized the ES&S ivotronic voting system.

In December 2005, Franklin County purchased 4,208 iVotronic voting systems from ES&S.

The electronic voting system deployed by Franklin County on November 7, 2006 consisted of the following software, firmware and modules:

Module	Franklin Co. Version
Election Data Manager	7.4.3.0*
Hardware Programming Manager	5.2.2.0*
Data Acquisition Manager	6.0.0.0
Election Reporting Manager	7.1.2.1
iVotronic Image Manager	2.0.1.0
Ballot Image Manager	7.4.1.0
Audit Log Manager	7.3.0.0
Unity	3.0.1.1
iVotronic Firmware	9.1.6.4
M650	2.1.0.0
M100 Optical scanner	5.2.0.0*

The electronic voting system certified by the Ohio Secretary of State and the United States Election Assistance Commission (USEAC), a federal independent testing authority, consisted of the following software, firmware and modules.

Module	Certified Version
Election Data Manager	7.4.4.0
Hardware Programming Manager	5.2.4.0
Data Acquisition Manager	6.0.0.0
Election Reporting Manager	7.1.2.1
iVotronic Image manager	2.0.1.0
Ballot Image Manager	unspecified
Audit Log Manager	7.3.0.0
Unity	3.0.1.1
iVotronic Firmware	9.1.6.4
M650	2.1.0.0
M100 Optical scanner	5.2.0.0

The voting system certified by the Ohio Secretary of State and USEAC and the voting system utilized by Franklin County on November 7, 2006 varied in relation to the following components.

Module	Certified Version	Franklin Co. Version
Election Data Manager	7.4.4.0.	7.4.3.0*
Hardware Programming Manager	5.2.4.0	5.2.2.0*
M100 Optical Scanner	5.2.1.0	5.2.0.0*

The Election Data Manager (EDM) is a key component of ES&S' proprietary Unity Election System. It is the foundation of the System. The EDM is a single-entry database that stores all a jurisdiction's precinct, office and candidate information. Once an initial election's information is properly entered, it can be recalled and edited for all following elections.

The Unity Hardware Programming manager (HPM) seamlessly programs the ES&S election tabulation hardware with election-specific information from the Unity Election Data Manager (EDM).

The HPM imports the ballot definition file created by the EDM. The HPM is used for "burning" the election information onto the various Memory Devices used by the tabulation subsystems, including the Model 100 PCMCIA cards. The master election database is created once for all precincts, districts, and precinct/district relationships through the AEAADM. This single database is used to program the Model 100 and – through an import/export procedure – the ES&S AutoMARK system.

The Ohio Secretary of State and USEAC do not certify components, these agencies certify electronic voting systems. Here the system utilized was not certified. All parties and inferior courts agree on this.

ES&S holds its electronic voting systems source codes as propriety and confidential information and will not release its source code.

Dr. Rebecca Mercuri, President of and Chief Technology Office of Notable Software was the only expert witness to testify in this action.

Dr. Mercuri has her full-time position at Notable Software, Inc., following two years as a Harvard University Fellow, first at the John F.

Kennedy School of Government, and then at the Radcliffe Institute for advanced study. Prior to the Harvard Fellowships, she had been an Assistant Professor of Computer Science at Bryn Mawr College in Pennsylvania. She has spent over twenty-five years as an employee and consultant to industry and government agencies, with much of her work in the area of real-time microprocessor-based systems (of which ballot tabulation equipment is an example). She is fluent in over a dozen computer languages, ranging from assembly to object-oriented programming, and is also a skilled Microsystems (board-level) designer and computer systems analyst.

Dr. Mercuri holds a Doctor of Philosophy degree in Computer and Information Science from the School of Engineering and Applied Science at the University of Pennsylvania, where she successfully defended her dissertation "Electronic Vote Tabulation: Checks and Balances" in October 2000. In addition to her PhD., she has two Master's degrees and a Bachelor's degree in Computer Science and Engineering. She is the sole author or primary co-author of over 40 articles on vote tabulation. She is currently also a contributing editor and columnist for the Communications of the Association for Computing Machinery.

Dr. Mercuri's expert witness clients have included: The New Jersey Public Defender's Office, the New Jersey Office of Attorney Ethics and numerous private law firms. Cases in which she has been involved have pertained to: criminal investigations, civil and municipal matters, product performance claims, and patent reviews. Often her expert witness work involves forensic collection and examination of physical evidence (such as data media, computer hardware, and software), and review and reconstruction of damaged or deleted files and data records.

Dr. Mercuri has been involved in investigating electronic vote tabulation since 1989, primarily as a research scientist, but also in the capacity of an expert witness. Her writings on this subject have been cited in the U.S. Congressional Record and on the floor of the Irish Parliament. She has also delivered comments upon request to the U.S. House Science Committee, the U.S. Commission on Civil Rights, the U.K. Cabinet's Office of the e-Envoy, the Federal Election in Connecticut, Pennsylvania and North Carolina, the New York State Board of Elections, and numerous municipal boards. She had a direct role in influencing Vote Act and many State Elections Laws. She had a direct role in influencing the wording pertaining to paper ballot records that appears in the Help America Vote Act (HAVA) and many State Elections Laws. She served three years as a member of the Institute for Electrical and Electronics Engineers working group that provided material incorporated into the current draft of the Election Assistance Commission's HAVA voting system standards. During the course of her investigations and research she has cast sample votes on a wide range of balloting briefed on the operation and set-up of this equipment, communicated with numerous election company officials, technical and sales personnel, and reviewed equipment certification reports, election laws and standards from various States (including the use of accessibility and voter verified audit trail features), been briefed on the operation and set-up of this equipment, communicated with numerous election company officials, technical and sales personnel, and reviewed equipment certification reports, election laws and standards from various States (including Ohio).

Dr. Mercuri attended most of the December 11, 2006 recount that was conducted for the Squire/Geer race at the Franklin County Board of Elections Warehouse at 1719 Alum Creek Drive, Columbus, Ohio. On December 12, 2006, she assisted in the counting of signatures and voting authorizations recorded in the Franklin County poll books for the November 7, 2006 election. Additionally, she reviewed recount and records request correspondence (received through one of the public records requests made by the undersigned to the Ohio Secretary of State's office) dated between April 6, 2005 and October 3, 2006, pertaining to the certification of ES&S voting systems in the State of Ohio and the purchase of the ES&S system by Franklin County. She also reviewed various pertinent Ohio State election laws and election-related litigation via the Lexis-Nexis system. She read a copy of the redacted interim report, dated November 30, 2005, prepared by the Election Science Institute (ESI) examining the security of the Franklin County's iVotronic Touch Screen Voting System, which had been provided to the undersigned by Matthew Damschroder, Director of the Franklin County Board of Elections.

Dr. Mercuri testified that although information brochures distributed by Franklin County's Board of Elections state that the "new voting machines are federally certified and have passed three independent software audits, including a first-in-the-nation source code review commissioned by your Franklin County Board of Elections" this was actually untrue. First of all, it appears that some critical components of the voting system, namely the ES&S Unity Management System (version 3.0.1.1) and the ES&S iVotronic firmware (version 9.1.6.4) had only received federal "provisional certification [that] applies only to the specific version and release of the product in its evaluated configuration and only for the duration of the EAC Interim Certification Program." In fact, the federal and subsequent Ohio state certification for these versions specified certain component version numbers that varied from the ones that were used by the County. Specifically, the certified version of the Election Data Manager that was Hardware Programming Manager 5.2.4.0 and the County used 7.4.3.0; for the Hardware Programming Manager it was 5.2.4.0 and the County used 5.2.2.0; and from M100 Optical Scanner it was 5.2.1.0 and the County used 5.2.0.0. (Note that these earlier versions had been federally and state certified, but only for earlier Unity and iVotronic versions, and not as configured with the Unity and iVotronic versions that were used by Franklin County in the November 7, 2006 election.) Dr. Mercuri testified that the use of mismatched components violates certification requirements and also runs the risk of exposure to programming errors (bugs) or security vulnerabilities that could compromise the integrity of the election and result in the loss or mistabulation of votes.

Dr. Mercuri testified that the use of an uncertified voting system actually places all votes cast on the uncertified system into question. Specifically,

Dr. Mercuri expressed the following opinions:

a) That an uncertified electronic voting system was deployed by Respondent Board for the November 2006 general election, not the system certified by the Ohio Secretary of State or the federal EAC;

b) That use of an uncertified system effected the tabulation of votes in the Squire/Geer election contest;

c) That use of an uncertified system effected drop off in the Squire/Geer contest, effecting over 90,000 votes, and effecting the outcome of the race so as to make it uncertain;

d) That a logic and accuracy test is inconclusive of whether an electronic voting system functioned properly;

e) That given the failure to use a certified voting system coupled with the numerous irregularities that occurred in this election, there is no way to accurately ascertain the actual outcome of the Squire/Geer contest; and

f) That the November 7, 2006 Franklin County general election was the most poorly administered election she had ever observed in her career, including Bush vs. Gore.

REASON FOR GRANTING THE PETITION

As was argued in the Wexler case:

> Nothing is more fundamental to our democratic republic than the people's right to vote. Yet, for all our experience with voting, states face persistent question about the integrity of their vote-counting capacities. The use of new, technologically sophisticated voting mechanisms has neither quelled that public concern nor instilled public confidence in the resulting vote count. Instead, it has exacerbated the public's discomfort because of frequent news reports of programming, security, training, and operational errors, as well as instances when votes have been lost and election results could not be verified.

See, Wexler v. Florida, Petition for Certiorari.

A. CERTIFICATION

Yet in the face of unrebutted proof that Respondent Board in this matter intentionally chose to deploy an uncertified voting system, the Ohio Supreme Court trivialized and ignored the integral role of voting equipment in the conduct of fair and democratic elections.

Voting equipment certification is the confirmation that a machine will function properly during an election. The absence of certification is confirmation that a machine can not be certain to have functioned properly. It is therefore logical to conclude that the results of an election conducted on an uncertified system are uncertain. The Ohio Supreme Court glossed over this important truth.

The opinion of the Ohio Supreme Court in this matter is at direct odds with that of the Sixth Circuit in Stewart v. Blackwell that the use of an error prone voting system is a due process violation not a mere irregularity and stands for the proposition that Ohio Revised Code 3506.05(B) may be violated with impunity unless a person challenging its violation can produce evidence of the circular proposition that a deficient voting system did not operate properly. This result is illogical in its reasoning and totally ignores the basis for certification of voting systems as determined by the United States Election Assistance Commission (USEAC) and the Ohio General Assembly, that a system will operate properly during an election.

In point of fact, the USEAC Voting System Testing & Certification Program manual states:

> 3. When Voting Systems Must Be Submitted for Testing and Certification
>
> 3.1 The Overview. An EAC certification signifies that a voting system has been successfully tested to identify voting system standards adopted by the EAC,

Only the EAC can issue a Federal certification by the EAC. Only the EAC can issued a Federal certification. Ultimately, systems must be submitted for testing and certification under this program to receive this certification.

3.2 What is an EAC Certification? Certification is the process by which the EAC, through testing and evaluation conducted by an accredited Voting System Test laboratory, validates that a voting system meets the requirements set forth in existing voting system testing standards (Voting System standards (VSS) or VVSG), and performs , according to the Manufacturer's specifications for the system. An EAC certification may be issued only by the EAC in accordance with the procedures presented in this Manual. Certification issued by other bodies (e.g. the National Association of State Election Directors and State certification programs) are not EAC certifications.

3.2.3 Significance of an EAC Certification. An EAC certification is an official recognition that a voting system (in a specific configuration or configurations) has been tested to and has met an identified set of Federal voting standards.

EAC Voting System Testing & Certification Program manual, p. 17 (emphasis added).

The Ohio Supreme Court determined that a board of elections may utilize an uncertified system during an election unless it can be shown that the uncertified system did not function properly. This undermines the entire mandatory nature of R.C. 3506.05(B) and ignores the fact that R.C. 3506.05(B) shifts the burden to the board to only use certified or previously validated equipment.

B. THE USE OF ERROR-PRONE VOTING EQUIPMENT DEPRIVED FRANKLIN COUNTY VOTERS OF THE OPPORTUNITY TO HAVE THEIR VOTES COUNTED WITHOUT ANY RATIONAL JUSTIFICATION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Any election practice or procedure that adversely impacts the right to exercise the franchise in a free and uninhibited manner is violative of the Due Process Clause of the Fourteenth Amendment. See, Black v. McGuffrage, 209 F. Supp. 2d 889 (N. D. Ill 2004), citing Reynolds v. Sims, 377 U.S. 533 (1950) and Yick Wo v. Hopkins, 118 U.S. 356. Even though the United States Supreme Court has not recognized a right to a perfect error-free voting system, to a particular voting system, or even to certain levels of convenience or effectiveness in voting, (See, e.g. Burdicle v. Takushi, 504 U.S. 428 (1922)) , once a state legislature determines how a vote may be cast, the right to vote, legislatively prescribed, is a fundamental right. See, Bush v. Gore, 531 U.S. 98 (2000). Here, Ohio's Legislature mandated that votes cast on electronic voting machines, Direct Recording Electronic systems or DRE's may only lawfully be cast on systems that have been certified by the Ohio Secretary of State. Here, Respondent the Board of Elections, intentionally opted to encumber the fundamental right of Franklin County, Ohio voters with the uncertainty and hazards inherent in utilization of an uncertified system in an election. The absence of certification subjects the very functioning of a system to skepticism and raises questions concerning its performance and accuracy. This state imposed uncertainty concerning the effective operation of the system utilized in Franklin County, Ohio in 2006 is a due process violation.

The United States Court of Appeals for the Sixth Circuit has discussed the fundamental nature of the right to vote free from state imposed uncertainty and obstructions as follows:

> A. The Right to Vote
>
> Voting is a fundamental right. See e.g., Reynolds v. Sims, 277 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."). For more than a century the Supreme Court has acknowledged the fundamental nature of the right to vote. See Yick Wo. V. Hopkins, 118 U.S. 356, 371 (1886) (acknowledging " the political franchise of voting" as "fundamental political right").

"Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights , any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds, 377 U.S. at 562. Careful and meticulous scrutiny is necessary because even minor infringements on the franchise can have reverberations in other contexts and throughout democratic society. "A consistent line of decisions by [the Supreme] Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear." Id. 554 ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."); see also U.S. Const. Amends. X. XVII, XIX, XXIV, XXVI. For example, all qualified voters have a constitutionally protected right to vote. Ex parte Yarbrough, 110 U.S. 651, 656 (1884). Citizens cannot be denied the right to vote outright. Guinn v. United States, 238 U.S. 347, 362 (1915); Lane v. Wilson, 307 U.S. 268, 274-75 ("The Fifteenth Amendment secures freedom from discrimination on account of race in matters affecting the franchise," and "nullifies sophisticated as well as simple-minded modes of discrimination.") Dilution of the right to vote may not be accomplished by stuffing the ballot-boxes. Ex parte Siebold, 100 U.S. 371 (1879). Nor may the right to vote be diluted by alteration of ballots or improper counting of ballots. United States v. Classic, 313 U.S. 299, 315 (1941). In Classic, the Court stated that: "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted [properly]...This court has consistently held this is a right secured by the Constitution." Id. (emphasis added). Dilution of the right to vote through various techniques, including racial gerrymandering, Gomillion v. Lightfoot, 364 U.S. 399, 345 (1960), and conducting white primaries, Terry v. Adams, 345 U.S. 461, 469 (1953), likewise violate the Constitution due to the effect of denying some citizens the right to vote. What is clear from all of the Supreme Court's voting rights cases is that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds, 377 U.S. at 555. The Supreme court's cases have also made another principle unmistakable: "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Id.

The Stewart Court also favorably cited Justice Douglas's dissent in South v. Peters, 339 U.S. 276 (1950), where he stated that:

> There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting

> booth. The right to vote includes the right to have the ballot counted. It also includes the right to have the vote counted at full value without dilution or discount.
>
> Id. At 279 (citation omitted); see also, Reynolds, 377 U.S. at 562 ("And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.") Voting dilution, of course, while just as effective as an outright denial of the franchise, may be accomplished in many ways, both intentionally and unintentionally, in a manner that does not immediately shock the senses as would an outright denial... "One must be ever aware that the Constitution forbids sophisticated as well as simple mined modes of discrimination." Reynolds, 377 U.S. at 563 (internal quotation marks omitted).

Unlike some of the precedents where the challenge was based upon the discriminatory impact deployment of poorly functioning equipment had upon certain neighborhoods, racial or geographic groups, here the violation has been visited uniformly on all voters in Franklin County. Thus, although the violation did not discriminate against any particular classification of Franklin County voters, it did subject votes cast in Franklin County to the technological hazards and uncertainty sought to be avoided by the Ohio Legislature, when it mandated that votes may only be cast on certified systems.[2]

As the Supreme Court stated in Bush v. Gore, 531 U.S. at 105, the Constitution embodies a "minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right." When a state extends the right to vote to its citizens, it must not only comply with the Equal Protection Clause, but must also assure the Due Process Clause's "rudimentary requirements...of fundamental fairness" are satisfied. Id. at 109. In Black v. McGuffage, the court addressed an Illinois voting system that, much like Ohio's, relied extensively on equipment (in that case punch cards) that produces significant numbers of residual votes. Noting that "the right of suffrage is a fundamental matter in a free and democratic society," 209 F. Supp. 2d at 900, the court concluded that a system for registering and tabulating votes that resulted in a situation where "the votes cast in some districts will have a significantly greater chance of being counted than votes cast in neighboring election districts" would be "irrational" and would give rise to a due process violation. Id. At 900-01.

Where as here a system uses an error-prone voting system, a system that would subject hundreds of thousands of voters, to a significant and unreasonable risk that their votes would not be counted, such a system arbitrarily deprives voters of one of their most cherished of constitutional liberties, the right to vote. This system cannot be justified by any legitimate government interest and therefore violates due process.

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[2] Although this is fundamentally a due process challenge, it should be noted that the November 2006 general election also involved contests for federal and statewide office. Accordingly, Franklin County voters voting for statewide and federal candidates did so on a system less likely to accurately record votes than adjacent counties using certified equipment, an Equal Protection violation.

Where as here a challenged practice has made uncertain or alters the outcome of an election, courts are justified in taking the extraordinary steps of voiding a state election. See, Ayers v. Distefano, 37 F.3d 726 (1st Cir. 1994). In cases of outrageous violations of constitutional rights courts tend to invalidate affected elections simply for their lack of integrity. See, Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967); Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966). This is particularly true where as here the "irregularity" could have made uncertain or altered the election outcome. See, Coalition for Education in District of Ohio v. Board of Election, 370 F. Supp 42 (S.D. N.Y. 1974) aff'd 495 F.2d 1090 (2d Cir. 1974). "An altered [or uncertain] outcome should be found readily where there is a serious violation..." Hamer v. Ely, 410 F.2d 152 (5th Cir. 1967). Ohio law states an election will be voided "where there is clear and convincing evidence that an irregularity occurred and there is clear and convincing evidence that it affected enough votes to change or make uncertain the result of the election." In re. Election of November 6, 1990 for the Office of Atty. Gen. of Ohio (1991) 58 Ohio St.3d 103, 106, 569 N.E.2d 447.

In this matter, the Ohio legislatively created requirement that votes may only be cast on certified voting systems, creates a presumption, that is a finding as a matter of law, that the outcome of an election conducted on uncertified system is uncertain.[3]

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[3] This legislative presumption is buttressed here by the only expert testimony on the matter from Dr. Mercuri. Dr. Mercuri stated in response to whether use of an uncertified system affected the tabulation of votes as follows:

A. Yes, I have an opinion on whether it affected the tabulation of votes.

Q. I'm specifically referring to whether you have an opinion as to whether it affected the tabulation of votes in the election between Carole Squire and Christopher Geer.

A. Yes, I have an opinion with regard to that.

Q. What is your opinion?

A. My opinion is that with a – with a high degree of scientific certainty one is not able to ascertain whether there was anything that was correct about the manner in which it was set up, so one has to be skeptical about all of the votes as recorded by the iVotronic system because it was not certified version of the system.

Q. And in a related vein, in you opinion would it be possible to determine the outcome of the election between Carole Squire and Christopher Geer in light of those assumptions?

A. In my opinion, in light of those assumptions, there would be no way to ascertain the outcome of the election, based on the fact that there were so many egregious disparities between the procedures that were supposed to have taken place and the manner in which

Here the Ohio Supreme Court trivialized the violation of a legislatively imposed requirement calculated to assure public confidence and accuracy

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equipment was supposed to have been set up, there is no way to ascertain what the outcome actually should be.

Q. Now, Doctor, based upon your experience and your training and observation of elections, including being involved, as you have testified earlier, as an expert in the Bush/Gore recount and in countless other political contests around the country, can you quantify to what extent you view the issues and problems that you encountered in this election versus what you have seen elsewhere?

A. The issues and problems that I have seen in this election far outstrip any of the types of issues that I've seen, even including the Bush versus Gore. In most of those instances, there was one problem or, you know, one set of problems.

But in this, it cuts across the methodology used for the recount, the quantities of the ballots that were supposed to have been counted that were not counted, the methods by which things were impounded, the lack of certification of the voting system. It is so broad, it is beyond any type of experience that I have had in its nature of multiple types of things that seem to have had blatant disregard of the admonitions and the rules and the procedures that were supposed to have been prescribed including, even those that were warned Franklin County about by their independent testing that they had had done and that they had commissioned to do.

So it is well beyond anything that I have ever seen in any of the types of elections that I have been involved with working on.

in electronic voting systems. Confidence that has been justifiably shaken by recent admissions of manufacturers such as Diebold, whose electronic voting systems are in use in many Ohio counties, that their systems lose votes, and that has led to decertification in California of the Elections System & Software type equipment used in Franklin County by the California Secretary of State. In the face of lingering uncertainty concerning the integrity of electronic voting technology, the Ohio Supreme Court's trivialization of the intentional use of an uncertified system as a mere irregularity is shocking. The events in this matter give rise to a federal due process violation under the rationale stated in Stewart v. Blackwell, that the right to reliable and error free voting systems is fundamental to the right to vote. Accordingly, it is respectfully requested that Certiorari be granted.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

September 2, 2008
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SQUIRE, APPELLANT, v.
GEER ET AL., APPELLEES.

**[Cite as *Squire* v. *Geer*, 111
Ohio St. 3d 506, 2008-Ohio-1432.]**

Election contest — Voting irregularities — Uncertified voting system — Conies tor failed to prove by clear and convincing evidence that election irregularities affected enough votes to make uncertain the election result. (No. 2007-1684 - Submitted February 26. 2008 - Decided April 2, 2008.) APPEAL from the Court of Appeals for Franklin County, No. 06AP-1285.

Per Curiam.

{¶1} This is an appeal from a judgment denying an election contest. Because the appellant failed to establish by clear and convincing evidence that any election irregularities affected enough votes to change or make uncertain the election result, we affirm.

{¶2} On November 7, 2006. an election was held in Franklin County, Ohio, to elect a candidate to the office of judge of the Franklin County Court of Common Pleas, Domestic Relations Division and Juvenile Branch, for the term commencing January

5, 2007. The candidates were appellant. Carole R. Squire,[1] and appellee Christopher J. Geer.

{¶3} Appellee Franklin County Board of Elections conducted the official canvass of the election returns on November 27, 2006, and declared Geer the winner by a vote of 137,941 to 124,877, a margin of 13,064 votes. Squire requested a recount of 35 precincts as well as all absentee and provisional ballots. On December 14, 2006, after conducting this recount, the board of elections again declared Geer the winner, this time by a vote of 137,979 to 124,910, a margin of 13,069 votes.

{¶4} On December 22, 2006, Squire filed a complaint in the Court of Appeals for Franklin County contesting the election. Squire claimed that "[g]ross irregularities and stunning violations of Ohio law occurred in connection with the casting of ballots, tabulation of votes, and recount procedures affecting enough votes to change or make uncertain the November 7, 2006 election result." Squire requested that the election be set aside and declared invalid and that she be declared the victor. In her complaint as well as by separate motion. Squire requested that the court of appeals conduct a recount.

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[1] On October 25, 2007, in a disciplinary proceeding, the court suspended Squire from the practice of law for two years, with 12 months stayed on the condition that she commit no further disciplinary violations within the two-year period of suspension. *Disciplinary Counsel* v. *Squire*, 116 Ohio St.3d 110. 2007-Ohio-5588, 876 N.E.2d 933.

{¶5} The court of appeals ordered the board of elections to forward to the clerk of the court all ballot materials pertinent to the recount in the election, including "ballots, poll books, paper rolls, provisional ballots and/or books, and any other records necessary for this court to determine the merits of this contest action."' In accordance with the order, the board gathered the relevant materials but was advised by the court administrator to keep the records until the court could find a suitable location for them. Upon Squire's affidavit seeking disqualification of the judges of the Franklin County Court of Appeals, the chief justice disqualified them and appointed three judges from outside the county to preside over the case.

{¶6} Following a trial pursuant to R.C. 3515.08(C) and 3515.11, the court of appeals denied the election contest. The court of appeals concluded that although Squire had established that one or more election irregularities had occurred, she "failed to prove by clear and convincing evidence that a sufficient number of votes were actually affected to make the outcome of the election uncertain." The court also denied Squire's motion for a second recount.

{¶7} The cause is now before us upon Squire's appeal and upon appellees' joint motion to strike appellant's reply-brief appendix and the portions of appellant's reply brief relying on the appendix.

Motion to Strike

Squire submitted an appendix with her reply brief that included six documents that were not part of the record before the court of appeals. One of these documents is the December 7, 2007 final report of the evaluation and validation of election-related equipment, standards, and testing in Ohio prepared as part of a project initiated by the secretary of state. Squire relies on this report's findings in her reply brief.

{¶9} On January 15, 2008, appellees filed a joint motion to strike appellant's reply-brief appendix and portions of appellant's reply brief relying on the appendix. On January 25, appellant filed a memorandum in opposition.

{¶10} "The determination of a motion to strike is vested within the broad discretion of the court." *State ex rel. Morgan v. New Lexington,* 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 26. In exercising this discretion here, we grant appellees' motion for the following reasons.

{¶11} First, Squire's new material may not be considered." 'We cannot * * * add matter to the record before us that was not part of the court of appeals' proceedings and then decide the appeal on the basis of the new matter.' " *North* v. *Beightler,* 112 Ohio St.3d 122, 2006-Ohio-6515, 858 N.E.2d 386, ¶ 7, quoting *Dzina v. Celebrezze,* 108 Ohio St.3d 385, 2006-Ohio-1 195, 843 N.E.2d 1202, ¶ 16. We have applied this principle in an election-contest appeal to strike portions of an appendix in brief that were not part of the trial court record. *In re Contested Election of November 2, 1993* (1995), 72 Ohio St.3d 411, 413, 650 N.E.2d 859.

{¶12} Second, although appellate courts can take judicial notice of certain matters, see, e.g., *State ex rel. Everhart v. McIntosh,* 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 9-10, the exhibits in Squire's appendix to her reply brief do not contain facts susceptible of judicial notice. Evid.R. 201 specifies that a "judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably] be questioned." Squire's exhibits, including the report prepared as part of the project initiated by the secretary of state, do not contain facts that are "not subject to reasonable dispute," as required by the rule. See *Natl. Distillers & Chem. Corp. v. Limbach* (1994), 71 Ohio St.3d 214, 215-216, 643 N.E.2d 101.

{¶13} Therefore, we grant appellees' motion and strike Squire's reply-brief appendix as well as the portions of her reply brief relying on the appendix. Election Contest - Standard of Proof

{¶14} Squire contests the November 7, 2006 election for the office of judge of the Franklin County Court of Common Pleas, Domestic Relations Division and Juvenile Branch. In assessing Squire's claim, "'every reasonable presumption should be indulged in favor of upholding the validity of an election and against ruling it void." *In re Election Contest of Democratic Primary Election Held May 4, 1999 for Clerk, Youngstown Mun. Court* (2000), 88 Ohio St.3d 258, 262, 725 N.E.2d 271. "[A]n election result will not be disturbed unless the evidence establishes that the result was contrary to the will of the electorate." Id.; see also *Crane* v. *Perry Cty. Bd of Elections,* 107 Ohio St.3d 287, 2005-Ohio-6509, 839 N.E.2d 14,120.

{¶15} To prevail in her election contest, Squire "had to establish by clear and convincing evidence that one or more election irregularities occurred and that the irregularity or irregularities affected enough votes to change or make uncertain the result of the * * * election," *Maschari v. Tone,* 103 Ohio St.3d 411, 2004-Ohio-5342, 816 N.E.2d 579, ¶ 21. "Clear and convincing evidence" is "that measure or degree of proof which is more than a mere 'preponderance of evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established," *Cross v. Ledford* (1954), 161 Ohio St. 469, 53 O.O. 361, 120 N.E.2d 118, paragraph three of the syllabus; *Crane,* 107 Ohio St.3d 287, 2005-Ohio-6509, 839 N.E.2d 14,1)22.

{¶16} Squire asserts that she has met this standard of proof by establishing that the board of elections committed errors in four separate areas: (1) use of an uncertified voting system during the November 7, 2006 election, (2) failure to comply with R.C. 3515.13 and a court of appeals order to forward all ballot materials pertinent to the recount to the court of appeals, (3) noncompliance with the secretary of state's recount requirements and procedures, and (4) violation of the postelection statutory duties to preserve records. These assertions are next considered.

Uncertified Voting System

{¶17} In the November 7, 2006 election, the board of elections used iVotronic voting machines supplied by Election Systems & Software, Inc. ("ES&S"). In October 2006, the United States Election Assistance Commission provisionally certified the ES&S voting system "in its evaluated configuration." The evaluated configuration included the following module versions: (1) Election Data Manager - 7.4.4.0, (2) Hardware Programming Manager - 5.2.4.0, and (3) M100 Optical Scanner - 5.2.1.0. The versions of these modules used by the board of elections in the November 7, 2006 election were (1) Election Data Manager - 7.4.3.0, (2) Hardware Programming Manager- 5.2.2.0, and (3) M100 Optical Scanner - 5.2.0.0. These versions had been previously certified at the federal and state level, although in a different configuration.

{¶18} "No voting machine, marking device, automatic tabulating equipment, or software for the purpose of casting or tabulating votes or for communications among systems involved in the tabulation, storage, or casting of votes shall be * * * put in use, or continued to be used * * * unless it * * * ha[s] been certified by the secretary of state * * *." R.C. 3506.05(B). "The secretary of state, in consultation with the board of voting machine examiners, shall establish, by **rule,** guidelines for the approval, certification, and continued certification of the voting machine, marking devices, and tabulating equipment to be used under Title XXXV of the Revised Code." R.C. 3506.05(H)(l). The secretary of state promulgated Ohio Adm.Code 111 :3-3-01(C)(15), which requires voting equipment to have been "certified by an independent testing authority as meeting or exceeding the minimum requirements of the federal election commission voting system standards."

{¶19} As the court of appeals concluded, the board's use of a configuration of modules that was not certified by the secretary of state or the United States Election Assistance Commission constituted an election irregularity because it violated the pertinent statute and rule.

{¶20} Squire, however, still had to prove by clear and convincing evidence that this irregularity affected enough votes to change or make uncertain the election result. *Maschari,* 103 Ohio St.3d 411, 2004-Ohio-5342, 816 N.E.2d 579, ¶ 21. Squire's expert witness, Dr. Rebecca Mercuri. testified that because she had no way of knowing that the voting system as configured worked properly, she had to "assume to the contrary.'" Crediting this testimony, however, would result in an impermissible shift of the burden of proof to the contestee.

{¶21} Moreover, appellees introduced evidence that this election irregularity did not affect sufficient votes to either change or make uncertain the election result. According to ES&S representatives, the different versions of the modules that were used were compatible with the certified system and provided accurate election results.

{¶22} Finally, Squire's reliance on a complaint seeking civil damages filed by California's secretary of state against ES&S for supplying an uncertified voting system and a judgment affirming a federal district court's judgment against a voting-machine manufacturer for breach of implied warranty, *Montgomery Cty.* v. *Microvote Corp.* (C.A.3, 2003), 320 F.3d 440, is misplaced because neither case involved an election contest.

{¶23} Therefore, the court of appeals did not err in holding that Squire failed to establish that the board's use of an uncertified configuration of modules either changed or made uncertain the election result.

Transmission of Ballot Materials to Court of Appeals

{¶24} R.C. 3515.13 provides, "If any contest of election involves a recount of the ballots in any precincts, the court shall immediately order the ballots of the precincts in which the recount is demanded to be sent to the court in such manner as the court designates, and such court may appoint two master commissioners of opposite political parties to supervise the making of the recount." Pursuant to R.C. 3515.13, the court of appeals ordered the board of elections to transmit the ballot materials pertinent to the recount to the clerk of the court. But the board of elections did not immediately do so because a court representative advised it to hold off on transmitting the materials due to a lack of space.

{¶25} Squire claims that the board's failure to comply with R.C. 3515.13 and the court of appeals' order requires reversal of the court of appeals' judgment. Squire's claim lacks merit.

{¶26} "R.C. 3515.13 is simply a tool that—in the proper, limited circumstances—can be used by a contestor to advance his or her claim by verifying the presence of irregularities and their impact on the election." *Taft* v. *Cuyahoga Cty. Bd of Elections,* 110 Ohio St.3d 471, 2006-Ohio-4204, 854 N.E.2d 472, ¶ 25. R.C. 3515.13 leaves it within the court's discretion to order a court-supervised recount. Id. at ¶ 24-26. There is nothing to indicate that the court of appeals abused its discretion in ultimately rejecting Squire's request for a court-supervised recount here.

{¶27} The evidence submitted at the election-contest trial also established that once the court of appeals issued its order, the board of elections impounded the pertinent materials and secured them in a locked area under the sheriffs protection in the board's warehouse. The court of appeals thus properly concluded that there was no evidence that these records were tampered with or altered in any way.

Recount Procedures

{¶28} Squire next contends that the board of elections committed several irregularities when the board failed to follow the secretary of state's recount requirements and procedures. Squire claims that the board also violated R.C. 3515.04 and that these violations of R.C. Title 35 are prima facie evidence of fraud. See R.C. 3599.42.

{¶29} Squire argues that any violation of R.C. Title 35 obviates the need for a contestor to establish by clear and convincing evidence that any irregularities affected enough votes to change or make uncertain the result of the election. But we have rejected this specific argument and emphasized that "it is immaterial which type of irregularity is alleged in an election contest. The inquiry remains the same: whether there is clear and convincing evidence that an irregularity occurred and, if so, whether there is clear and convincing evidence that it affected enough votes to change or make uncertain the result of the elections." *In re Election of November 6, 1990 for the Office ofAtty. Gen. of Ohio* (1991), 58 Ohio St.3dlO3, 106, 569N.E.2d447.

{¶30} Regarding the second requirement for a successful election contest, Squire failed to establish by clear and convincing evidence that any election irregularity involving the board's recount procedure affected enough votes to change or make uncertain the election result. Despite evidence **that** in most of the precincts, the total number of ballots cast on the voting machines did not match the number of signatures in the poll books, the board of elections conducted an analysis of the vote disparities and concluded that there was a maximum of 2,824 more votes cast than signatures recorded and a minimum of 2,116 more votes cast. This difference does not alter or render uncertain the election result, which Geer won by more than 13,000 votes according to both the official canvass and the recount.

Postelection Procedures

{¶31} Under R.C. 3505.32(A), -'not earlier than the eleventh day or later than the fifteenth day after a general or special election * * * the board of elections shall begin to canvass the election returns from the precincts in which electors were entitled to vote at that election." Prior to the tenth day after a general election, the board may examine the poll books and correct errors or defects in them. R.C. 3505.32(D). The board of elections must carefully preserve the ballots and poll books used in the election and seal them after the results have been certified, and the board shall not permit the seals to be broken or changes to be made to the records while they are in the board's custody except for those changes permitted by R.C. 3505.32. See R.C. 3505.31.

{**¶32**} Squire claims, inter alia, that the board of elections violated R.C. 3505.31 and 3505.32 by making changes and corrections to the poll books, permitting employees to handle the records for the purpose of auditing the results, and maintaining the records in an open location and not under seal.

{**¶33**} Appellees introduced evidence, however, that rebutted Squire's claims. The board of elections staff reviewed the poll books and made corrections and changes to them only during the nine-day period before the official canvass, as authorized by R.C. 3505.32(D). The board employees also used the election records that were not impounded to prepare an audit to compare the number of signatures in the poll books with the machine count and to make a record of which electors voted, but the records were not altered during the process. As the court of appeals concluded, it is not an irregularity for board of elections employees to have access to the poll books to conduct the essential functions of their jobs.

{**¶34**} In addition, the board of elections had broken the seals on some of the records because the Squire-Geer recount was the third recount for the November 7, 2006 election. Although the records were unsealed and were placed in a warehouse that was not occupied exclusively by the board, the records were under around-the-clock security provided by the county sheriff.

{**¶35**} Therefore, Squire failed to establish that any minimal irregularities in the board's postelection procedures changed or made uncertain the election result.

Conclusion

{¶36} Because Squire failed to prove by clear and convincing evidence that any election irregularities affected enough votes to change or make uncertain the election result, the court of appeals properly denied Squire's election contest. See *Harmon v. Baldwin,* 107 Ohio St.3d 232, 2005-Ohio-6264, 837 N.E.2d 1196, ¶ 40. Our holding is consistent with the court's reluctance to disturb the vote of citizens "'except under extreme circumstances that clearly affect the integrity of the election." *Election of November 6, 1990 for the Office of Atty. Gen. of Ohio,* 58 Ohio St.3d at 105, 569 N.E.2d 447; *Crane,* 107 Ohio St.3d 287, 2005-Ohio-6509, 839 N.E.2d 14, 1 21. Therefore, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., and PFEIFER, LUNDBERG STRATTON, O'CONNOR, O'DONNELL, LANZINGER, and CUPP, JJ., concur.

Percy Squire Co., L.L.C., and Percy Squire, for appellant.

Ron O'Brien, Franklin County Prosecuting Attorney, and Patrick J. Piccininni and Nick A. Soulas Jr., Assistant Prosecuting Attorneys, for appellee Franklin County Board of Elections.

Christopher J. Geer, pro se.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

[ENTERED: SEPTEMBER 4, 2007]

Carole R. Squire,
Constestor,

No. 06AP-1285
v. (REGULAR CALENDAR)

Christopher J. Geer,
Contestee.

JUDGMENT ENTRY

Contestor's July 5, 2007 Motion for a hearing De Novo is denied.

Contestor's August 16, 2007 notice of filing of supplemental materials is construed as a motion to file supplemental evidence and is denied as untimely.

We adopt the finding of fact and conclusions of law submitted by Magistrate Joel F. Sacco in toto. Accordingly, it is the judgment of this Court that Contestor's request for a writ is hereby denied.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

IT IS SO ORDERED.

/s/ Francis E. Sweeney
Justice Francis E. Sweeney, retired of the Ohio Supreme Court assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

/s/ James D. Sweeney
Judge James D. Sweeney, retired of the Eighth Appellate District assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

/s/ Anthony Valen
Judge Anthony Valen, retired of the Twelfth Appellate District assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Carole R. Squire, :
Contestor : **No. 06AP-1285**
v. :
: **Expedited Calendar**
Christopher J. Geer, :
Contestee :

MAGISTRATE'S DECISION
Rendered on June 28, 2007

Percy Squire Co., LLC, Percy Squire and Phil Wright for Contestor, Carole R. Squire

Ron O'Brien, Franklin County Prosecuting Attorney, Patrick J. Piccininni, and Nick A. Soulas, Jr. for Intervenor, Franklin County Board of Elections

Christopher J. Geer, pro se for Contestee, Christopher J. Geer

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This cause came to be heard in accordance with the provisions of Ohio Revised Code Sections Sections 3515.08, et seq, before Magistrate Joel F. Sacco in the Franklin County Court of Appeals on February 19, 20, 21, 28, and March 1, 2007 upon the Complaint of the Contestor filed on December 22,

2006. Contestor's Complaint set forth the following allegations:

1. Constestor was at all times a qualified and registered voter in Precint 8-C, in the City of Columbus, Franklin County, Ohio.

2. Contestor and Contestee were candidates for the office of Judge of the Court of Common Pleas, Full Term, commencing January 5, 2007, at the election held in Franklin County, Ohio on November 7, 2006.

3. On November 27, 2006, the Franklin County Board of Elections declared that Contestee, Christopher Geer, was the successfully elected candidate by a vote of 137,941 to 124,877, a margin of 13,877 votes.

4. Contestor demanded a recount in a timely fashion and the results of the recount were released by the Franklin County Board of Elections on December 14, 2006 declaring that Christopher Geer was elected by a vote of 137,979 to 124,910, a margin of 13,069 votes.

5. That the contestee, Christopher Geer, is not the legally elected candidate for the Office of Judge of the Court of Common Pleas by reason of gross irregularities, fraud and stunning violations of Ohio law that occurred in connection with the casting of ballots, tabulation of voters and recount procedures which affected enough votes to change or make uncertain the November 7, 2006 election

result. Contestor alleged that more votes were cast on November 7, 2006 than signatures appeared in election precinct pollbooks, that numerous voters signed precinct pollbooks where votes were never recorded on Franklin County voting machines, that recount procedures mandated by the Ohio Secretary of State were not followed by the Franklin County Board of Elections in connection with the Squire/Geer recount, and that contrary to the mandatory requirements of Ohio law the electronic voting system deployed by Franklin County for the November 7, 2006 general election was not certified by an independent testing authority or the Ohio Secretary of State.

6. Contestor requested judgment that the election that the election of the Contestee be set aside and declared invalid and that Contestor be declared elected to the Office of Judge of the Court of Common Pleas, Full Term commencing January 5, 2007.

In addition to requesting in the Complaint that the recount procedures mandated by Ohio Revised Code Section 3513.13 be invoked, Contestor filed on January 22, 2007 a separate Motion requesting that the recount procedures of ORC 3513.13 be followed.

Christopher Geer, Contestee, timely filed an Answer to Contestor's Complaint. The Franklin County Board of Elections, having been granted permission to intervene in the within action, also timely filed an Answer to Contestor's Complaint.

On January 4, 2007, Ohio Supreme Court Chief Justice Thomas Moyer granted Contestor's request/affidavit to disqualify all Franklin County Judges from acting on any further proceeding in this action. On January 12, 2007, Chief Justice Moyer appointed visiting Judges from outside Franklin County to preside over all further proceeding in the action – with authority to appoint a Magistrate to gather evidence in accordance with Chapter 3515, Ohio Revised Code. On January 18, 2007 Joel F. Sacco was appointed Magistrate to conduct evidentiary proceedings.

The Contestor called the following fact witnesses to testify at the trial of this matter: Matthew M. Damschroder, Director of the Franklin County Board of Elections; Gary L. Weber, Vice President, Software Development, Election Systems & Software; Karen S. Cotton, Manager of Elections Operations, Franklin County Board of Elections; Beverly Campbell, candidate for election to the Ohio House of Representatives, 20th District in the November 7, 2006 general election; Teresa Dawson, Squire/Geer recount observer, and Rada Anada, Squire/Geer recount observer. In addition the Contestor called Dr. Rebecca Mercuri, President and Chief Technology Officer of Notable Software, as an expert witness.

The Intervenor examined all of the witnesses called by Contestor at trial, and called Matthew W. Damschroder, Director of the Franklin County Board of Elections, as a witness on its behalf.

Based upon the evidence presented at trial, the Magistrate issues the following Findings of Fact:

1. Carole R. Squire, Contestor, and Christopher J. Geer, Contestee, were candidates for election to the office of Judge of the Court of Common Pleas, full term commencing January 5, 2007.

2. On November 27, 2006, Intervenor, the Franklin County Board of Elections, conducted the official canvass of returns, mandated by ORC 3515.32, and declared contestee the winner of the Squire/Geer contest by a vote of 137,941 to 124,877, a margin of 13,064 votes.

3. On November 30, 2006 Carole Squire timely requested a recount of 35 precincts, absentee votes, and the county wide provisional votes. Carole Squire depoisited $2850.00 with the Franklin County Board of Elections for the recount. The 35 precincts requested to be recounted were Brown-A, Columbus 07-B, Columbus 10-F, Columbus 11-C, Columbus 21-E, Columbus 23-D, Columbus 33-B, Columbus 33-C, Columbus 42-A, Columbus 58-C, Columbus 59-B, Columbus 59-D, Columbus 60-B, Columbus 63-A, Columbus 65-B, Columbus 72-E, Columbus 74-A, Columbus 75-B, Columbus 75-G, Columbus 76-E, Columbus 82-F, Columbus 86-A, Grove City 2-E, Grove City 3-E, Hilliard 1-A, Hilliard 1-C, Hilliard 1-E, Hilliard 2-A, Reynoldsburg 2-B, Upper Arlington 6-A,

Westerville 2-B, Westerville 4-C, Worthington 1-A, and Worthington 1-B.

4. On December 11, 2006, subsequent to a recount in the 15th Congressional District, the recount of this race was conducted.

5. The Ohio Secretary of States' Recount Requirements and Procedures Directive 2006-50 called for 3% of the absentee votes to be handed counted, and 3% of the precinct votes to be recounted. The provisional votes cast during the election are not a precinct unto themselves.

6. The Franklin County Board of Elections counted 2072 absentee votes, when they should have recounted 2702 absentee votes.

7. The Secretary of State's Directive requires the Board of Elections to select one or more precincts whose vote equals at least 3% of the total vote. The Franklin County Board of Elections designated a method by which precincts were randomly selected to be recounted until the vote total in the randomly selected precincts exceeded 3% of the total vote.

8. Contrary to the Ohio Secretary of State's Directive (section F4c1) the Franklin County Board of Elections did not check the public counters prior to this recount to verify that the numbers on those counters corresponded to the numbers on the VVPAT (voter verified

paper audit trail) and the poll books, poll lists or signature book records. However, the Franklin County Board of Elections did perform this process approximately two weeks earlier as part of the official canvass.

9. Contrary to the Ohio Secretary of State's Directive the Franklin County Board of Elections did not in the presence of two election officials of different political parties make the poll books, poll lists or signature poll book records available on December 11, 2006 for visual inspection by the recount witnesses. The poll books, poll lists or signature poll book records were physically located at the main office of the Board of Elections, while the recount of the 35 requested precincts was conducted at the Board of Elections' warehouse.

10. The Franklin County Board of Elections reviewed the poll books during the period before the official canvas began. Certain corrections were made to correct errors, voter audits were made, and voters were given credit before the official canvass began. Notations were made in precinct workbooks and poll books by Board of Elections staff. No date was placed by the initials of the person making the notation to indicate when the notations were made.

11. The public count on DRE's in every precinct should equal the number of signatures recorded in that precinct's poll book plus

provisional votes cast minus the number of cancelled votes.

12. For the November 7, 2006 general election, in 721 out of the 835 Franklin County precincts the public count on DRE's did not equal the number of signatures in the poll books plus provisional votes cast minus the number of cancelled votes.

13. It has been the practice if the Franklin County Board of Elections in the past, after the official canvass of an election is over, to store poll books, signature books and precinct workbooks in an open area of the office accessible to all staff members.

14. The audit of votes reflected in Inervenor's Exhibit A/Contestor's Exhibit 41 – Intervenor's total County audit, determined a countywide imbalance between votes cast and signatures recorded in pollbooks in 2824 more votes cast than signatures scanned. The Board's subsequent analysis showed 2116 more votes than signatures.

15. The testimony of Teresa Dawson and Rada Ananda individually and/or collectively is not sufficient to prove by clear and convincing evidence that votes were miscounted or that votes were actually changed from one candidate to another.

16. Of the voters in the November 7, 2006 election who voted for Governor by paper ballots,

22.15% did not vote in the Squire/Geer contest. Of those who voted for Governor by DRE or electronic ballot, 33.81% did not vote in the Sqire/Geer contest. This represents a difference of 11.66%. In the past three elections this "voter drop off" was reversed in the sense that persons voting absentee dropped off at a higher rate than persons utilizing voting machines or voting in the precincts.

17. The November 7, 2006 general election was the first election in which Franklin County, Ohio utilized the Electronic Systems & Software (ES&S) iVotronic voting system, having purchased 4,208 iVotronic voting systems from ES&S in December 2005.

18. The electronic voting system deployed by Franklin County on November 7, 2006 consisted of the following software, firmware and modules:

Module	Franklin Co. Version
Election Data Manager	7.4.3.0*
Hardware Programming Manager	5.2.2.0*
Data Acquisition Manager	6.0.0.0
Election Reporting Manager	7.1.2.1
iVotronic Image Manager	2.0.1.0
Ballot Image Manager	7.4.1.0
Audit Log Manager	7.3.0.0
Unity	3.0.1.1
iVotronic Firmware	9.1.6.4

M650	2.1.0.0
M100 Optical Scanner	5.2.0.0*

19. The electronic voting system certified by the Ohio Secretary of State and the United States Election Assistance Commission (USEAC) consisted of the following software, firmware and modules:

Modules	Certified Version
Election Data Manager	7.4.4.0
Hardware Programming Manager	5.2.4.0
Data Acquisition Manager	6.0.0.0
Election Reporting Manager	7.1.2.1
iVotronic Image Manager	2.0.1.0
Ballot Image Manager	unspecified
Audit Log Manager	7.3.0.0
Unity	3.0.1.1
iVotronic Firmware	9.1.6.4
M650	2.1.0.0
M100 Optical Scanner	5.2.1.0

The USEAC interim certification program in place at the time the above software, firmware and modules were granted interim certification specifically states that the ES&S Unity Management System (version 3.0.1.1) and the ES&S iVotronic firmware (version 9.1.6.4) received "provisional certification that applies only to the specific version and release of the product in its evaluated configuration and only for the duration of the USEAC Interim Certification Program." The duration of the certification did include the time period leading up to and after the November 7, 2006 election and recounts.

20. The voting system certified by the Secreatary of State and the USEAC and the voting system utilized by Franklin County on November 7, 2006 varied in the following component versions.

Module	Certified Ver.	Franklin Co. Ver.
Election Data Manager	7.4.4.0	7.4.3.0
Hardware Program. Mngr.	5.2.4.0	5.2.2.0
M100 Optical Scanner	5.2.1.0	5.2.0.0

21. The earlier versions of Election Data Manager, Hardware Programming Manager, and M100 Optical Scanner utilized by Franklin County on November 7, 2006 had each been previously federally state certified; but they had been certified in conjunction with earlier Unity and iVotronic versions, and not as configured with the Unity and iVotronic versions that were used by Franklin County in the November 7, 2006 election.

22. Dr. Rebecca Mercuri, President and Chief Technology Officer of Notable Software was the only expert witness to testify in this matter. Dr. Mercuri has spent over twenty-five years as an employee and consultant to industry and government agencies, with much of her work in the area of real-time microprocessor based systems (of which ballot

tabulation is an example). Dr. Mercuri holds a Doctor of Philosophy degree in Computer and Information Science from the School of Engineering and Applied Science at the University of Pennsylvania, where she completed her dissertation entitled "Electronic Vote Tabulation: Checks and Balances" in 2000. In addition to her PhD., she has two Master's degrees and a Bachelor degree in Computer Science and Engineering. She is the sole or primary author of over forty published technical papers, nearly all of which have pertained to electronic balloting or vote tabulation. Dr. Mercuri has been involved in investigating electronic vote tabulation since 1989 primarily as a research scientist, but also in the capacity of an expert witness.

23. Dr. Mercuri testified that the use of componets that are mismatched – ie componets that are configured in a way that was not certified by the USEAC – violates certification requirements and also runs the risk of exposure to programming errors or security vulnerabilities that could compromise the integrity of the election and could result in the loss or mistabulation of votes.

24. The Election Science Institute (ESI) study (Exh. 6) that was conducted on the voting system used in Franklin County, Dr. Mercuri testified, identified seven recommended procedures which Franklin County should take to mitigate certain identified security risks in the voting system. Dr. Mercuri

pointed out that these procedures were not all implemented. She testified that Franklin County has not completed a review of the 1.4 million lines of code contained collectively in the software which compromises the modules. Dr. Mercuri concluded that she had "very serious concerns about security" during the election.

25. In Dr. Mercuri's opinion the use of an uncertified configuration of modules does have the potential to effect voter drop-off if numbers are not accurately transferred between one of the modules and the next module.

26. In Dr. Mercuri's opinion the use of an uncertified configuration of modules places all of the votes recorded by the iVoltronic system – less those hand counted – in question. Dr. Mercuri further stated "that there is no way to conldude that the ... vote tally that has been provided is correct", and that "there is no way to ascertain what the outcome actually should be."

27. On the other hand, Dr. Mercuri admitted under cross-examination that she did not have sufficient evidence to conclude that votes were switched from one candidate to the other. Also, Dr. Mercuri acknowledged that she would not assume that the Franklin County voting system operated properly unless she had proof that it did.

28. While Dr. Mercuri questioned, in several contexts, the degree to which the certainty of these election results could be posited, she was unable to set forth with any specificity the degree to which these election results should be doubted.

29. In evaluating an election contest under R.C. 3515.08, et seq., the Contestor is required to show (1) that one or more election irregularities occurred, and (2) that the irregularity or irregularities affected enough votes to change or make uncertain the result of the election. **In Re Election of November 6, 1990 For The Office of Attorney General of Ohio (1991),** 58 Ohio St. 3d. 103, 105. In evaluating the election contest, the inquiry is "whether there is clear and convincing evidence that an irregularity occurred and, if so, whether there is clear and convincing evidence that it affected enough votes to change or make uncertain the result of the election." Id.

"The evidence must show that the election result was contrary to the will of the electorate, or the result will not be disturbed." **Portis v. Summit Cty. Bd. Of Elections,** (1993) 67 Ohio St. 3d. 590, citing **In re Election of November 6, 1990,** supra, 58 Ohio St. 3d. at 105, 569 N.E. 2d. at 450. "Additionally, every reasonable presumption should be indulged in favor of upholding the validity of any election and against ruling it void." **Copeland v. Tracy** (1996), 111 Ohio

App. 3d. 648, 655; **Beck v. Cincinnati** (1955), 162 Ohio St. 473, 475.

Conclusions of Law

1. In order to prevail in an election contest, the contestor must prove by clear and convincing evidence that one or more election irregularities occurred and that the irregularity or irregularities affected enough votes to change or make uncertain the results of the election. **In re Election of November 6, 1990 for the Office of Attorney General of Ohio** (1990), 58 Ohio St. 3d. 103, 569 N.E. 2d 447.

2. The standard for clear and convincing evidence was set forth in **Cross v. Ledford** (1954), 161 Ohio St. 469, at paragraph three of the syllabus:

> That measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

3. "The evidence must show that the election result was contrary to the will of the electorate, or the result will not be disturbed." **Portis v. Summit Cty. Of Elections,** (1993) 67 Ohio St. 3d. 590, citing, **In re Election of**

November 6, 1990, supra, 58 Ohio St. 3d. at 105, 569 N.E.2d at 450; **Mehling v. Moorehead** (1938), 133 Ohio St. 395, 408.

4. "Additionally, every reasonable presumprion should be indulged in favor of upholding the validity of an election and against ruling it void." **Copeland v. Tracy** (1996), 111 Ohio App. 3d. 648, 655.

5. The method of selection by the Franklin County Board of Elections of the 3% hand count of the RTAL's/VVPAT's was proper and in accordance with the Secretary of State's Directive 2006-50.

6. It is not an irregularity for Franklin County Board of Elections officials to have access to the poll books to conduct the essential functions of their jobs.

7. While the election records were not delivered to the Court in accordance with the order of this Court dated December 27, 2006, no evidence was presented that election records were tampered with or altered in any way which would change the intent of the voter.

8. Contestor proved by clear and convincing evidence that one or more election irregularities occurred including the use by Franklin County of a configuration of modules that was not certified by the USEAC or the Ohio Secretary of State's Office.

9. Contestor failed to prove by clear and convincing evidence that a sufficient number of votes actually affected to make the outcome of the election uncertain.

10. Having failed to prove by clear and convincing evidence that a sufficient number of votes were actually affected to alter the outcome of the election, it is the decision of the Magistrate that this Court deny Contestor's Complaint which requested that the election of the Constee be set aside and that the Contestor be declared elected to the office of the Judge of the Court of Common Pleas, Full Term commencing January 5, 2007. Accordingly Judgment should be rendered in favor or the Contestee and Intervenor.

11. Further, it is the decision of the Magistrate that this Court deny Contestor's separate Motion For a Recount filed on January 22, 2007.

12. It is also the decision of the Magistrate that this Court grant the Contestor's Motion To Strike.

/s/ Joel F. Sacco
JOEL F. SACCO, MAGISTRATE

IN THE SUPREME COURT OF OHIO

[ENTERED JUNE 4, 2008]

Carole R. Squire

v.

Case No. 2007-1684
RECONSIDERATION ENTRY
Franklin County

Christopher J. Geer

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Franklin County Court of Appeals; No. 06AP1285)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE SUPREME COURT OF OHIO

[ENTERED APRIL 4, 2008]

CAROLE R. SQUIRE : Case No. 07-1684
Contestor, : On Appeal from
vs. : The Franklin
: County Court of
CHRISTOPHER J. GEER, et al.: Appeals, Tenth
Contestee. : Appellate District
: Court of Appeals
: Case No.
: 06AP-1285

AMENDED MOTION OF APPELLANT CAROLE R. SQUIRE FOR RECONSIDERATION

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MEMORANDUM IN SUPPORT OF RECONSIDERATION

I. ARGUMENT

THE APRIL 2, 2008 OPINION EMPLOYS CIRCULAR AND THEREFORE FALLACIOUS LOGIC

Appellant, Carole R. Squire, respectfully requests reconsideration of the decision announced April 2, 2008, affirming the judgment of the Franklin County Court of Appeals denying the contest of election filed by Appellant concerning the November 7, 2006 election for judge the Franklin County Court of Common Pleas, Domestic Relations Division and Juvenile Branch. Reconsideration is requested for the reason the Court's April 2, 2008 Opinion constitutes a tacit repeal of R.C. 3506.05(B) which states "No voting machine, marking device, automatic tabulating equipment or software for the purpose of casting or tabulating votes or for communicating among systems involved in the tabulation, storage or casting of votes shall be.. .put in use, or continued to be used...unless it...has been certified by the secretary of state,..R.C. 3506.05(BV (Emphasis added.) Today, the Court has determined that notwithstanding the express mandate of R.C. 3506.05(B) prohibiting the use of an uncertified system, that an uncertified system may be put in use or continued in use by a board of elections, such as Franklin County here, unless it can be shown that the uncertified system does not function properly. In other words, the Court has ruled that R.C. 3506.05(B) may be violated with impunity unless a person challenging its violation can produce evidence that the violating voting system does not operate properly. This result is illogical, circular in its reasoning and totally ignores the basis for certification of voting systems as determined by the United States Election Assistance Commission (USEAC) and the Ohio General Assembly.

In point of fact, the USEAC Voting System Testing & Certification Program manual states:

> 3. **When Voting Systems Must Be Submitted for Testing and Certification**
>
> 3.1 **Overview.** An EAC certification signifies that a voting system has been successfully tested to identified voting system standards adopted by the EAC. Only the EAC can issue a Federal certification. Ultimately, systems must be submitted for testing and certification under this program to receive this certification.
>
> 3.1 **What is an EAC Certification?** Certification is the process by which the EAC, through testing and evaluation conducted by an

accredited Voting System Test laboratory, validates that a voting system meets the requirements set forth in existing voting system testing standards (Voting System Standards [YSS] or WSG\ and performs according to the Manufacturer's specifications for the system. An EAC certification may be issued only by the EAC in accordance with the procedures presented in this Manual. Certification issued by other bodies (e.g. the National Association of State Election Directors and State certification programs) are not EAC certifications.

3.2.3. Significance of an EAC Certification. An EAC certification is an official recognition that a voting system (in a specific configuration or configurations) has been tested to and has met an identified

> set of Federal voting
> standards.

EAC Voting System Testing & Certification Program manual, p. 17 (emphasis added).

Today the Supreme Court has determined that a board of elections may utilize an uncertified configuration during an election unless it can be shown the uncertified system did not function properly. This undermines the entire mandatory nature of R.C. 3506.05(B) and ignores this fact that R.C. 3506.05(B) shifts the burden to the board of elections, or offending party, when an uncertified system is deployed. The April *2*,2008 decision conclusion in p. 7 that the burden to demonstrate whether the system worked properly would inapermissibly be shifted to the contestee, totally ignores the mandatory language in R.C, 3506.05(B) and should for that reason be reconsidered.

The April *2*, 2008 Opinion's statement that requiring elections officials to prove that uncertified voting equipment worked properly would result in an impermissible shift of the burden of proof to the contestee, also ignores the fact that the Franklin County Board of Elections, the entity charged with complying with R.C. 3506.05(B) is a party to this case. The board has a duty to conduct elections in accordance with Ohio law. It is not a shift in the burden of proof to require a board of elections to demonstrate affirmatively that unlawfully deployed voting equipment has functioned properly, especially where as in the case of Franklin County's board, it has been shown that the board not only deployed unlawful equipment, but has a practice of disabling the audit logs on electronic voting machines thereby depriving anyone from determining whether the machines' software functioned properly. See, Exhibit B. Aside from the board's established record of unlawfully disabling Franklin County voting equipment security features, the internal software in these machines is proprietary. As such, the contestor has no means of determining whether the machines functioned properly. The April 2, 2008 Opinion's contrary conclusion establishes an impossible burden on a contestor and ignores the realities of electronic voting systems, namely that the systems are operated with proprietary software which the vendor can prevent the very election officials who purchased the machines from accessing, let alone a contestor. The Opinion establishes an unrealistic and inappropriate burden on a contestor and should be reconsidered.

Not only does the April 2, 2008 decision tacitly repeal R.C. 3506.05(B) it misconstrued the testimony of Dr. Rebecca Mercliri concerning the functioning of the uncertified Franklin County system.

Contrary to the conclusion in the April 2, 2008 decision, Dr. Mercuri, the only expert to testify at trial, expressed the following unrebutted opinions during the trial:

a) That an uncertified electronic voting system was deployed by Intervenor for the November 2006 general election, not the system certified by the Ohio Secretary of state of the Federal EAC;

b) That use of an uncertified system effected the tabulation of votes hi the Squire/Geer election contest;

c) That use of an uncertified system effected drop off in the Squire/Geer contest, effecting over 90,000 votes, and effecting the outcome of the race so as to make it uncertain;

d) That a logic and accuracy test is inconclusive of whether an electronic voting system functioned properly;

e) That given the failure to use a certified voting system coupled with the numerous irregularities that occurred in this election, there is no way to accurately ascertain the actual outcome of the Squire/Geer contest; and

f) That the November *1*, 2006 Franklin County general election was the most poorly administered election she had ever observed in her career, including Bush vs. Gore.

See, Testimony of Dr. Rebecca Mercuri, Tr. Vol. Ill, p. 592, *et seq*. (See, Exhibit A for actual text of Dr. Mercui's unrebutted testimony.)

Contrary to the statement in the April 2, 2008 decision, Dr. Mercuri did not merely state that because she had no way of knowing that the voting system as configured worked properly, she had to assume to the contrary, she specifically stated one had to be skeptical of all votes cast on the uncertified system and that by reason of the use of an uncertified system the election result should be voided.

II. CONCLUSION

The mandate set forth within R.C. 3506.05(B) creates an affirmative duty on boards of election to only deploy certified voting equipment. Today's decision undercuts that mandate and is therefore contrary to law. The duty to deploy certified voting equipment is not tempered by an exception if one can prove an insufficient number of votes were affected. The April 2, 2008 Opinion should be reconsidered for the reason it flies directly in the face of R.C. 3506.05(B) and employs circular and therefore fallacious logic. By definition an uncertified voting system can not be shown to operate properly, otherwise it would be certified.

/s/Percy Squire
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Postal Service, facsimile and/or electronic mail April 4,2008, upon:

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/s/ Percy Squire
Percy Squire, Esq. (0022010)

EXHIBIT A

Excerpt of Transcript Pages 600-615

to stop -- automatically stop if the printer had run out of paper, and that did not appear to be the case. So if there was an Incomplete real time audit log, that may have given evidence of that particular instance.

We also know that of the ones that you had requested in the recount, those were ones that had failures at the end of election day. So, specifically, you were looking at the precincts where there were reported, by the poll workers, that there were reported problems -- the PEBs didn't work; there was, you know, other issues; they couldn't close of the polls -- and so the specific precincts that you targeted for the recount were the ones in which these problems had been experienced and noted by the poll workers.

Q: In connection with your observations on December 11, 2006, did you encounter any PEB issues?

A: Wee, I saw on that one real time audit log, when it rolled to the beginning and I asked to be allowed to look at it, it said that there was a -- the PEB malfunction -- I don't remember the exact wording but it was in my original affidavit.

And then it also had mentioned that there was a -- that password override that was -- that was printed there by the -- by the computer on that roll at the very beginning of it. So these, you know, these are the indicative that at the outset of the election when the machine was being set up, or perhaps when it was turned on at the polls, there was some problem with it.

Q: And what's the significance of a password override?

A: Well, in any type of computer systerm, if you override the password -- in other words, go beyond the privileges that the operator may have -- well, then, the sky's the limit. You could be executing commands that only a vendor could execute; you could be, you know, altering the ballot layout, altering the way that the votes are recorded on the tabulating unit. There's a whole host of things

A password override means that you're taking on different -- you may be taking on different privileges or you may be circumventing the reason for the password. You never are supposed to override a password. The password prevents you from doing things that you're not authorized to do.

So if there's a notation that a password was overridden, then that means that either additional privileges were being used that that -- we don't know what user was using it and whether they had authorization to use those privileges or what other things may have taken place once a password override was executed.

Q: Okay. Now, Dr. Mercuri, we have stipulated here today to your background, experience and education, and you have testified concerning your observations at the December 11, 2006 recount. You have also testified concerning various materials that we went through in detail this morning that you have reviewed in connection with your research and preparation to testify here.

Based upon all the aforementioned items, your background, education and training, do you have an opinion to a reasonable degree of scientific certainty whether a certified configuration of the iVotronic voting system was deployed in Franklin County, Ohio, on November 7th, 2006 for the general election?

A: Yes, I have an opinion.

MR. SOULAS: Objection, to the extent --

THE MAGISTRATE: One moment.

MR. SOULAS: Objection to the extent that calls for a legal conclusion, Your Honor. That's the decision that ultimately needs to be made by this Court.

THE MAGISTRATE: And, again, I'm going to overrule the objection. I've noted it and I, of course, will not abdicate my responsibility to make legal conclusions myself to Dr. Mercuri, but I will allow her opinion.

THE WITNESS: Yes, I have an opinion as to that.

THE MAGISTRATE: Go right ahead.

BY MR. SQUIRE:

Q: What is your opinion, Doctor?

A: My opinion is that an uncertified version of the system was deployed on the election in November; that it was not a certified version of the system, either certified by the State or certified by the federal EAC.

Q: All right.

Doctor, based upon the predicate that I delineated in my previous question and just out of the interest of time, I don't want to go back and go through that entire thing again -- that is, your background, your education, your training, the materials you reviewed, your participation in the recount -- do you have an opinion concerning whether the use of an uncertified configuration of the iVotronic -- iVotronic voting system on November 7th, 2006, in Franklin County, Ohio affected the tabulation of votes?

A: Yes, I have an opinion on whether it affected the tabulation of votes.

Q: I'm specifically referring to whether you have an opinion as to whether it affected the tabulation of votes in the election between Carole Squire and Christopher Geer.

A: Yes, I have an opinion with regard to that.

Q: What is your opinion?

A: My opinion is that with a with a high degree of scientific certainty one is not able to ascertain whether there was anything that was correct about the manner in which it was set up, so one has to be skeptical about all of the votes as recorded by the iVotronic system because it was not a certified version of the system.

Q: Dr. Mercuri, based upon your review of the materials we've previously discussed, your participating in the recount, your education, training and background, do you have an opinion to a reasonable degree of scientific certainty as to whether or not the deployment of an uncertified configuration of the iVotronic voting system on November 7th, 2006, in Franklin County, Ohio, affected the drop off in the election contest between Carole Squire and Christopher Geer?

A: Yes. It is my -- yes, I do have an opinion with regard to whether it could have affected the drop off.

Q: What is your opinion, Doctor?

A: My opinion is that it is possible, given the fact that it was an uncertified version of the system that was deployed on the election, that the - that the drop-off rate could have been affected by the use of the uncertified system to the point where the outcome is uncertain.

Q: Dr. Mercuri, based upon your review of the materials previously discussed, your education, training and background, participation in the November -- the December 11, 2006, recount, do you have an opinion to a reasonable degree of scientific certainty as to whether or not in the face of the use of an uncertified configuration of the iVotronic voting system that the conduct of a logic and accuracy analysis is a basis to establish that the iVotronic functioned properly on November 7th, 2006?

A: Yes, I have an opinion as to that.

Q: What is our opinion, Doctor?

A: My opinion, regardless of whether it is certified or uncertified system but, specifically, that it was an uncertified system, is that the logic and accuracy test provides no conclusive evidence at all, whatsoever, that the system -- any of the voting systems deployed throughout the entire time of the election, during the election, and at the point of tabulation.

Logic and accuracy test does not -- does not provide that conclusive evidence at all, whatsoever.

Q: Dr. Mercuri, I would like for you to assume the following facts: Assume that the Franklin County Board of Elections conducted an audit of its books, records and other data related to the November 7, 2006, election and concluded that there were somewhere in the range of 2000 to 2800 vote discrepancy between the signatures in the poll books and votes cast;

Assume that Bev Campbell, a candidate for the Ohio House of Representatives, conducted an audit of 109 precincts to balance or attempt to balance the signatures and those who cast votes at the November 7, 2006, election that concluded that there was an absolute vote spread of 984 over 109 precincts;

Assume that Rady Ananda did an audit of 206 precincts and concluded that there was a vote-to-signature discrepancy in the range of 1500 to 3300 votes;

Assume that an uncertified version of the iVotronic voting system was deployed by the Franklin County Board of Elections on November 7, 2006;

That a recount was conducted following the election where fewer than 3 percent of the absentee votes were counted, as required by law to be counted manually;

That the drop off on voting machines deployed on the November 7th -- that is, electronic voting machines was higher than it had been in past elections;

That ballots, poll books or precinct workbooks were not maintained and safeguarded in accordance with state law, or kept under seal; and that a recount was conducted where there was no initial audit of poll books or precinct workbooks or public counters conducted.

Do you have an opinion based upon your education, background and training, the assumptions that I have asked you to make, your research and experience, as to whether or not all of the delineated factors were sufficient to render the outcome of the election conducted November 7, 2006 between Carole Squire and Chris Geer uncertain?

MR. SOULAS: Objection, Your Honor. That calls for an ultimate legal conclusion which, once again, is solely within the purview of this Court. Again, I'm not taking issue with the numbers -- with her opining as to numbers, with her opining as to issues relating to computer technology and voting systems in general, but when we are adding in precinct workbooks, when we're adding in drop off numbers, when we are adding in areas that are outside her stated expertise for her to offer an opinion on, that's just inappropriate.

MR. SQUIRE: May I respond, Your Honor?

THE MAGISTRATE: Yes.

MR. SQUIRE: Your Honor, I framed a hypothetical and I asked the doctor to make assumptions. I didn't ask her to reach any legal conclusion.

I asked her to assume that state law was not followed, I asked her to assume numbers, and to assume a predicate -- not to in any way offer an opinion as to whether those assumptions are correct -- and to base her opinion on the hypothetical. That's what experts do.

MR. SOULAS: However, the ultimate conclusion is the issue that is to be reached by this Court.

MR. SQUIRE: The ultimate conclusion is whether or not the factors that she assumed, if true, whether they were of sufficient magnitude to alter the outcome. That is the -- I'm sorry.

THE MAGISTRATE: No, no. Go ahead. You're fine.

MR. SQUIRE: That's the -- I'm asking for an expert, certainly, to advance an opinion on the ultimate issue in dispute. I mean, that's --

THE MAGISTRATE: And certainly is the ultimate issue in dispute here --

MR. SQUIRE: Yeah.

THE MAGISTRATE: -- and it's one that I have to decide myself based upon the law and the facts as introduced in this case, and I'm well aware of that.

And in this case, I am going to allow the expert to give her opinion. Go ahead.

MR. SQUIRE: And, Your Honor, I would just cite not to belabor, it Rule 704, testimony in the form of an opinion or inference otherwise admissible is not objectionable soley because it embraces an ultimate issue to be decided by the trier of fact.

MR. SOULAS: And that's not the sole basis for the objection, Mr. Squire. The sole basis is that it calls for an ultimate legal conclusion and the witness is not an attorney.

MR. SQUIRE: All right.

BY MR. SQUIRE:

Q: Now, would you please -- do you have an opinon?

A: My, opinion, based on those assumptions, is that there -- that there is significant evidence that there -- that there is no way to conclude that the tally, the vote tally, that has been provided is correct. There's no way to conclude that.

Q: And in a related vein, in your opinion would it be possible to determine the outcome of the election between Carole Squire and Christopher Geer in light of those assumption?

A: In my opinion, in light of those assumptions, there would be no way to ascertain the outcome of the election, based on the fact that there were so many egregious disparities between the procedures that were supposed to have taken place and the manner in which equipment was supposed to have been set up, there is no way to ascertain what the outcome actually should be.

Q: Now, Doctor, based upon your experience and your training and observation of elections, including being involved, as you have testified earlier, as an expert in the Bush/Gore recount and in countries other political contests around the country, can you quantify to what extent you view the issues and problems that you encountered in this election versus what you have seen elsewhere?

A: The issues and problems that I have seen in this election far outstrip and of the types of issues I've seen, even including the Bush versus Gore. In most of those instances, there was one problem or, you know, one set of problems.

But in this, it cuts across the methodology used for the recount, the quantities of the ballots that were supposed to have been counted that was not counted, the methods by which things were impounded, that lack of certification of the voting system. It is so broad, it is beyond any type of experience that I have had in its nature of multiple types of things that seem to have had blatant disregard of the admonitions and the rules and the procedures that were supposed to have been prescribed including, even those that were warned Franklin County about by their independent testing that they had had done and that they had commissioned to do.

So it is well beyond anything that I have ever seen in any of the types of elections that I have been involved with working on.

Q: And one final question, Dr. Mercuri, based upon you previous answer, what recommendations, if any, do you have concerning this election?

A: My recommendation is that the totals should be set aside and the election should be voided.

MR. SQUIRE: Thank you, Doctor. I have no further questions.

THE MAGISTRATE: Okay.

And Mr. Soulas should be handling the cross-examination?

MR. SOULAS: Yes, sir, Your Honor.

THE MAGISTRATE: And, Dr. Mercuri, if you would be so kind to answer the questions of Mr. Nick Soulas as well.

THE WITNESS: Sure.

THE MAGISTRATE: Go right ahead whenever you're ready.

MR. SOULAS: And thank you for that instruction, Your Honor.

CROSS-EXAMINATION

BY MR. SOULAS:

Q: Good afternoon, Dr. Mercuri.

A: Good afternoon.

Q: Dr. Mercuri, with respect to the recount that was conducted on December 11, 2006, you testified you were there, correct?

A: I was there during some portions of it, yes.

Q: Do you --

A: A substantial portion.

Q: I'm sorry.

And what time did you -- what time did the recount start on that day on December 11, 2006?

A: I believe that the recount was supposed to start at 9:00 a.m., and I think I arrived around 9:30 a.m.

Q: Okay. And you testified when you arrived there that there were -- the RTALs were sitting on tables within the warehouse. Is that when you arrived at the warehouse was 9:30?

A: I believe I arrived at the -- around 9:30, approximately 9:30.

Q: Okay. And you had testified that there were rolls that the RTALs were sitting on the tables?

A: Right. There were numerous tables and there were tables where the recount was going on. There were two tables -- two separate tables. There was recounts going on in parallel. So there was the recount going on at one table, recount going on at another table. There were little carts with rolls sitting on them and those were being wheeled in.

And then there were larger tables behind sort of -- it was like a "don't cross" line sort of thing, and there were larger tables that had the rolls of the -- I assume the RTALs, but -- actually, it was characterized to me as those were the RTALs that were sitting on tables in the warehouse, yes.

Q: Okay. And you are aware that there were numberous recounts requested at the close of as a result of the November 7, 2006, election in Franklin County?

A: Yes, I'm aware of that.

Q: And that those RTALs would have, could have at least certain of them been used for the other recounts?

A: Yes.

Q: Which may account for some of the RTALs having been rewound or unwound and wound back up again?

A: Yes, I am -- I am aware of that.

Also some of them had, like, a -- they would put a green magic mark -- like a mark on them if they had been counted, too. So some of them had that additional mark.

Q: Where -- the mark was on the RTAL? Or on the sticker sealing it?

A: It was usually on the RTAL or maybe on the sticker.

Q: Okay.

Now, you testified that you have reviewed at least one -- was it only one RTAL that you were permitted to see?

A: That -- there was only one in which I was permitted to see the -- the end of it. When it came to the end, you know, to the end, which was really the beginning. Does that make sense? The end is really the beginning--

Q: Yes.

A: -- because you're starting from the end of it so you're rolling back to the beginning if you are you are doing it in that direction.

So there was one in which I saw the beginning of it. I specifically actually asked, before they sealed it up, if I could see that beginning part.

Q: Okay. So you asked to do you actually handle the RTAL?

EXHIBIT B

THE COLUMBUS DISPATCH

“County’s voting machines examined: Brunner triggers state probe by reporting that fall ballot apparently masked a name”

Sunday, March 16, 2008 3:22 AM

By Barbara Carmen
The Columbus Dispatch

When Jennifer Brunner cast her vote last fall, she is certain she saw something so odd on her touch-screen voting machine that it prompted a state criminal investigation into the Franklin County Board of Elections.

At least 15 of the county’s electronic machines are under double-lock at an Alum Creek warehouse. It is being treated as a crime scene.

County elections officials asked the Ohio Bureau of Criminal Identification and Investigation to seize the machines during the investigation by Attorney General Marc Dann and forensics consultants.

In all, the state is expected to spend as much as $48,000 to divine what Brunner saw -- or didn’t see. Investigators already have found that many of the county’s voting machines weren’t tested before the November election. And a function that tracked changes to the machines was purposely turned off.

Brunner isn't the average voter. As secretary of state, she is in charge of making sure Ohio's elections are properly conducted.

When she voted on Nov. 6, Brunner said she was surprised to see a gray bar and the words "candidate withdrawn" where Democrat Jay Perez's name ought to have been.

Her husband, voting on a nearby machine, told her, "Perez was on my ballot."

"That is a huge problem," Brunner said. "There is a great concern that not every voter has the same ballot."

Brunner allows that it might now be hard to find out what really happened.

Perez withdrew one day after Franklin County had finalized its ballots. He had hoped to avoid playing spoiler in fellow Democrat Patsy Thomas' race to retain her appointment to the Franklin County Municipal Court.

Instead, Perez's name remained on the ballots -- or allegedly, most ballots -- and Republican David Tyack won.

Ted Hart, a spokesman for Dann, said the attorney general's office won't comment, not even to confirm the investigation.

But Dennis L. White, director of the Franklin County Board of Elections, said Brunner is correct in turning over the matter for investigation to Dann's office.

"I told her, 'Jennifer, I don't see any way it could have happened. But if it did, it's huge. We have a federal election coming up this November. We need to find out.'"

White said Brunner phoned him a few days after the election and they immediately pulled every suspect machine and checked the ballots. Perez's name was listed each time, he said.

They also checked computerized copies of ballots and paper tapes. In each case, White said, no evidence supported what Brunner saw.

Brunner said consultants from SysTest Labs in Colorado, however, were skeptical. When she described the gray box with faint words "candidate withdrawn," the investigatiors told her, "That's exactly what you'd see if someone masked a name."

A SysTest report notes that voters in other precincts -- in Victoria Village, Clintonville and Hilliard -- also reported seeing "candidate withdrawn" on their machines.

SysTest investigators also found that the board had not preformed a routine test of the computer software on each machine, instead testing just one machine in each precinct.

White said they were following the instructions of the vendor, who was selected by the past secretary of state.

But Franklin County Commissioner Mary Jo Kilroy, hearing of the random testing, said, "That's outrageous."

As a result, the elections board tested every machine for the March primary.

Investigators also discovered that a board programmer turned off "audit logs" in the voting machines in April 2007, hindering investigators from reconstructing software changes. White found that the vendor had instructed a board employee on how to disable audits to speed programming.

Brunner said other vendors she consulted were appalled: "One I spoke with said, 'You're never supposed to tell a (client) how to do that.'"

White said it would be awkward for Brunner to investigate her own claim, and he doesn't believe it's valid.

"I don't know of any way that could happen. It would take the great-grandson of Al Capone and the great-grandson of Albert Einstein working in collusion to pull this off," White said.

bcarmen@dispatch.com

"I don't know of any way that could happen. It would take the great-grandson of Al Capone and the

great-grandson of Albert Einstein working in collusion to pull this off."

Dennis L. White
Director of the Franklin County Board of Elections

D. Due Process Clause of the Fourteenth Amendment to the United States Constitution

The relevant provision of the Fourteenth Amendment to the United States Constitution is reproduced below.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Chapter 111:3-3 Certification of Equipment 111:3-3-01 Certification; mandatory requirements.

(A) In examining equipment and related materials for possible approval, the board of voting machine examiners will generally consider the following:

(1) Whether the equipment can be used safely;

(2) Whether the equipment can be depended upon to record and count accurately and continuously the votes of electors;

(3) Whether the equipment has the capacity to be warranted, maintained, and serviced.

(B) No automatic tabulating equipment shall be approved by the board or certified by the secretary of state, or be purchased, rented or otherwise acquired or used unless it has been or is capable of being manufactured for use and distribution beyond a prototype and can be set by election officials to examine ballots and to count votes accurately for each candidate, question, and issue, excluding any ballots punched or marked contrary to the instructions printed on such ballots.

(C) No voting machine shall be approved by the board of voting machine examiners or certified by the secretary of state, or be purchased, rented, or otherwise acquired, or used, except when specifically allowed for experimental use, unless it fulfills the following requirements:

(1) The equipment permits and requires voting in absolute secrecy, and shall be so constructed that no person can see or know for whom any other elector has voted or is voting, except an elector who is assisting a voter as prescribed by section 3505.24 of the Revised Code;

(2) The equipment permits each elector to vote at any election for all persons and offices for whom and for which h the elector is lawfully entitled to vote, whether or not the name of any such person appears on a ballot label as a candidate to vote and for or against any question upon which the elector is entitled to vote;

(3) The equipment shall preclude each elector from voting for any candidate or upon any question for whom or upon which the elector is not entitled to vote, from voting for more persons for any office than the elector is entitled to vote for, and from voting for any candidates for the same office or upon any question more than once;

(4) The equipment shall permit each voter to deposit, write in, or affix, upon devices provided for that purpose, ballots containing the names of the persons for whom the voter desires to vote, whose names do not appear upon the voting machine and such devices shall be susceptible of identification as to party affiliations when used at a primary election;

(5) The equipment shall permit each elector to change that elector's vote for any candidate or upon any question appearing upon the ballot labels, up to the time the elector starts to register the elector's vote;

(6) The equipment shall permit each elector, at all presidential elections, by one device to vote for electors of one party for president and vice-president;

(7) The equipment shall be capable of adjustment by election officers so *as* to permit each elector, at a primary election, to vote only for the candidates of the party with which the elector has declared the elector's affiliation and shall preclude the elector from voting for any candidate seeking nomination by any other political party; and to vote for the candidates for nonpartisan nomination or election;

(8) The equipment shall have separate voting for candidates and questions, which shall be arranged in separate rows or column and it shall be so arranged that one or more adjacent rows or columns may be

assigned to the candidates of each political party at primary election;

(9) The voting machine shall have a counter, or other device, the register of which is visible from the outside of the machine, and which will show at any time during the voting the total number of electors who have voted; and also a protective counter, or other device, the register of which cannot be reset and will record the cumulative total number of movements of the internal counters;

(10) The voting machine shall be provided with locks and seals by the use of which, immediately after the polls are closed or the operation of the machine for an election is completed, no further changes to the internal counters can be allowed;

(11)The equipment shall have the capacity to contain the names of candidates constituting the tickets of at least five political parties, and independent groups and such number of questions as the secretary of state shall specify;

(12) The equipment shall be durably constructed of material of good quality in a neat and workmanlike manner, and in a form which shall make it safely transportable;

(13) The equipment shall be so constructed that a voter may readily learn the method of operating it, may expeditiously cast the

voter's vote for all candidates of the voter's choice, and when operated properly shall register and record correctly and accurately every vote cast;

(14) The equipment shall be provided with a screen, hood, or curtain which will conceal the voter while voting. During the voting, it shall preclude every person from seeing or knowing the number of votes registered for any candidate or question and from tampering with any of the internal counters;

(15) The equipment has been certified by an independent testing authority as meeting or exceeding the minimum requirements of the federal election commission voting system standards.

(D) The examiners will use a matrix rating sheet which provides for ratings of "acceptable" or "unacceptable" on each item.

HISTORY: Eff 1-28-95; 1-1-02 Rule promulgated under: RC 119.03 Rule authorized by: RC 3506.05(H)

3506.05 Certification of voting and tabulating equipment.

(A) As used in this section, except when used as part of the phrase "tabulating equipment" or "automatic tabulating equipment" :

> (1) "Equipment" means a voting machine, marking device, automatic tabulating equipment, or software.
>
> (2) "Vendor" means the person that owns, manufactures, distributes, or has the legal right to control the use of equipment, or the person's agent.

(B) No voting machine, marking device, automatic tabulating equipment, or software for the purpose of casting or tabulating votes or for communications among systems involved in the tabulation, storage, or casting of votes shall be purchased, leased, put in use, or continued to be used, except for experimental use as provided in division (B) of section 3506.04 of the Revised Code, unless it, a manual of procedures governing its use, and training materials, service, and other support arrangements have been certified by the secretary of state and unless the board of elections of each county where the equipment will be used has assured that a demonstration of the use of the equipment has been made available to all interested electors. The secretary of state shall appoint a board of voting machine examiners to examine and approve equipment and its related manuals and support arrangements. The board shall consist of one competent and experienced election officer and two persons who are knowledgeable about the operation of such equipment, who shall serve during the secretary of state's term.

For the member's service, each member of the board shall receive three hundred dollars per day for each combination of marking device, tabulating equipment, and voting machine examined and reported, but in no event shall a member receive more than six hundred dollars to examine and report on any one marking device, item of tabulating equipment, or voting machine. Each member of the board shall be reimbursed for expenses the member incurs during an examination or during the performance of any related duties that may be required by the secretary of state. Reimbursement of these expenses shall be made in accordance with, and shall not exceed, the rates provided for under section 126.31 of the Revised Code.

Neither the secretary of state nor the board, nor any public officer who participates in the authorization, examination, testing, or purchase of equipment, shall have any pecuniary interest in the equipment or any affiliation with the vendor.

(C)(1) A vendor who desires to have the secretary of state certify equipment shall first submit the equipment, all current related procedural manuals, and a current description of all related support arrangements to the board of voting machine examiners for examination, testing, and approval. The submission shall be accompanied by a fee of eighteen hundred dollars and a detailed explanation of the construction and method of operation of the equipment, a full statement of its advantages, and a list of the patents and copyrights used in operations essential to the processes of vote recording and tabulating, vote storage, system security, and other crucial operations of the equipment as may be determined by the board. An additional fee, in an amount to be set by rules promulgated by the board, may be imposed to pay for the costs of alternative testing or testing by persons other than board members, record-keeping, and other extraordinary costs incurred in the examination process. Moneys not used shall be returned to the person or entity submitting the equipment for examination.

(2) Fees collected by the secretary of state under this section shall be deposited into the state treasury to the credit of the board of voting machine examiners fund, which is hereby created. All moneys credited to this fund shall be used solely for the purpose of paying for the services and expenses of each member of the board or for other expenses incurred relating to the examination, testing, reporting, or certification of voting machine devices, the performance of any related duties as required by the secretary of state, or the reimbursement of any person submitting an examination fee as provided in this chapter.

(D) Within sixty days after the submission of the equipment and payment of the fee, or as soon thereafter as is reasonably practicable, but in any event within not more than ninety days after the submission and payment, the board of voting machine examiners shall examine the equipment and file with the secretary of state a written report on the equipment with its recommendations and its determination or condition of approval regarding whether the equipment, manual, and other related materials or arrangements meet the criteria set forth in sections 3506.07 and 3506.10 of the Revised Code and can be safely used by the voters at elections under the conditions prescribed in Title XXXV of the Revised Code, or a written statement of reasons for which testing requires a longer period. The board may grant temporary approval for the purpose of allowing experimental use of equipment. If the board finds that the equipment meets the criteria set forth in sections 3506.06, 3506.07, and 3506.10 of the Revised Code, can be used safely and can be depended upon to record and count accurately and continuously the votes of electors, and has the capacity to be warranted, maintained, and serviced, it shall approve the equipment and recommend that the secretary of state certify the equipment. The secretary of state shall notify all boards of elections of any such certification. Equipment of the same model and make, if it provides for recording of voter intent, system security, voter privacy, retention of vote, and communication of voting records in an identical manner, may then be adopted for use at elections.

(E) The vendor shall notify the secretary of state, who shall then notify the board of voting machine examiners, of any enhancement and any significant adjustment to the hardware or software that could result in a patent or copyright change or that significantly alters the methods of recording voter intent, system security, voter privacy, retention of the vote, communication of voting records, and connections between the system and other systems. The vendor shall provide the secretary of state with an updated operations manual for the equipment, and the secretary of state shall forward the manual to the board. Upon receiving such a notification and manual, the board may require the vendor to submit the equipment to an examination and test in order for the equipment to remain certified. The board or the secretary of state shall periodically examine, test, and inspect certified equipment to determine continued compliance with the requirements of this chapter and the initial certification. Any examination, test, or inspection conducted for the purpose of continuing certification of any equipment in which a significant problem has been uncovered or in which a record of continuing problems exists shall be performed pursuant to divisions (C) and (D) of this section, in the same manner as the examination, test, or inspection is performed for initial approval and certification.

(F) If, at any time after the certification of equipment, the board of voting machine examiners or the secretary of state is notified by a board of elections of any significant problem with the equipment or determines that the equipment fails to meet the requirements necessary for approval or continued compliance with the requirements of this chapter, or if the board of voting machine examiners determines that there are significant enhancements or adjustments to the hardware or software, or if notice of such enhancements or adjustments has not been given as required by division (E) of this section, the secretary of state shall notify the users and vendors of that equipment that certification of the equipment may be withdrawn.

(G)(1) The notice given by the secretary of state under division (F) of this section shall be in writing and shall specify both of the following:

> (a) The reasons why the certification may be withdrawn;
>
> (b) The date on which certification will be withdrawn unless the vendor takes satisfactory corrective measures or explains why there are no problems with the equipment or why the enhancements or adjustments to the equipment are not significant.

(2) A vendor who receives a notice under division (F) of this section shall, within thirty days after receiving it, submit to the board of voting machine examiners in writing a description of the corrective measures taken and the date on which they were taken, or the explanation required under division (G)(1)(b) of this section.

(3) Not later than fifteen days after receiving a written description or explanation under division (G)(2) of this section from a vendor, the board shall determine whether the corrective measures taken or

the explanation is satisfactory to allow continued certification of the equipment, and the secretary of state shall send the vendor a written notice of the board's determination, specifying the reasons for it. If the board has determined that the measures taken or the explanation given is unsatisfactory, the notice shall include the effective date of withdrawal of the certification. This date may be different from the date originally specified in division (G)(l)(b) of this section.

(4) A vendor who receives a notice under division (G)(3) of this section indicating a decision to withdraw certification may, within thirty days after receiving it, request in writing that the board hold a hearing to reconsider its decision. Any interested party shall be given the opportunity to submit testimony or documentation in support of or in opposition to the board's recommendation to withdraw certification. Failure of the vendor to take appropriate steps as described in division (G)(l)(b) or to comply with division (G)(2) of this section results in a waiver of the vendor's rights under division (G) (4) of this section.

(H)(l) The secretary of state, in consultation with the board of voting machine examiners, shall establish, by rule, guidelines for the approval, certification, and continued certification of the voting machines, marking devices, and tabulating equipment to be used under Title XXXV of the Revised Code. The guidelines shall establish procedures requiring vendors or computer software developers to place in escrow with an independent escrow agent approved by the secretary of state a copy of all source code and related documentation, together with periodic updates as they become known or available. The secretary of state shall require that the documentation include a system configuration and that the source code include all relevant program statements in low- or high-level languages. As used in this division, "source code" does not include variable codes created for specific elections.

(2) Nothing in any rule adopted under division (H) of this section shall be construed to limit the ability of the secretary of state to follow or adopt, or to preclude the secretary of state from following or adopting, any guidelines proposed by the federal election commission, any entity authorized by the federal election commission to propose guidelines, the election assistance commission, or any entity authorized by the election assistance commission to propose guidelines.

(3)(a) Before the initial certification of any direct recording electronic voting machine with a voter verified paper audit trail, and as a condition for the continued certification and use of those machines, the secretary of state shall establish, by rule, standards for the certification of those machines. Those standards shall include, but are not limited to, all of the following:

> (i) A definition of a voter verified paper audit trail as a paper record of the voter's choices that is verified by the voter prior to the casting of the voter's ballot and that is securely retained by the board of elections;

(ii) Requirements that the voter verified paper audit trail shall not be retained by any voter and shall not contain individual voter information;

(iii) A prohibition against the production by any direct recording electronic voting machine of anything that legally could be removed by the voter from the polling place, such as a receipt or voter confirmation;

(iv) A requirement that paper used in producing a voter verified paper audit trail be sturdy, clean, and resistant to degradation;

(v) A requirement that the voter verified paper audit trail shall be capable of being optically scanned for the purpose of conducting a recount or other audit of the voting machine and shall be readable in a manner that makes the voter's ballot choices obvious to the voter without the use of computer or electronic codes;

(vi) A requirement, for office-type ballots, that the voter verified paper audit trail include the name of each candidate selected by the voter;

(vii) A requirement, for questions and issues ballots, that the voter verified paper audit trail include the title of the question or issue, the name of the entity that placed the question or issue on the ballot, and the voter's

> ballot selection on that question or issue, but not the entire text of the question or issue.

(b) The secretary of state, by rule adopted under Chapter 119. of the Revised Code, may waive the requirement under division (H)(3)(a)(v) of this section, if the secretary of state determines that the requirement is cost prohibitive.

3506.10 Requirements for approval or certification of voting machines.

No voting machine shall be approved by the board of voting machine examiners or certified by the secretary of state, or be purchased, rented, or otherwise acquired, or used, except when specifically allowed for experimental use, as provided in section 3506.04 of the Revised Code, unless it fulfills the following requirements:

(A) It shall permit and require voting in absolute secrecy, and shall be so constructed that no person can see or know for whom any other elector has voted or is voting, except an elector who is assisting a voter as prescribed by section 3505.24 of the Revised Code.

(B) It shall permit each elector to vote at any election for all persons and offices for whom and for which the elector is lawfully entitled to vote, whether or not the name of any such person appears on a ballot label as a candidate; to vote for as many persons for an office as the elector is entitled to vote for; and to vote for or against any question upon which the elector is entitled to vote.

(C) It shall preclude each elector from voting for any candidate or upon any question for whom or upon which the elector is not entitled to vote, from voting for more persons for any office than the elector is entitled to vote for, and from voting for any candidates for the same office or upon any question more than once.

(D) It shall permit each voter to deposit, write in, or affix, upon devices provided for that purpose, ballots containing the names of persons for whom the voter desires to vote, whose names do not appear upon the voting machine. Those devices shall be susceptible of identification as to party affiliations when used at a primary election.

(E) It shall permit each elector to change the elector's vote for any candidate or upon any question appearing upon the ballot labels, up to the time the elector starts to register the elector's vote.

(F) It shall permit each elector, at all presidential elections, by one device to vote for candidates of one party for president, vice-president, and presidential electors.

(G) It shall be capable of adjustment by election officers so as to permit each elector, at a primary election, to vote only for the candidates of the party with which the elector has declared the elector's affiliation and shall preclude the elector from voting for any candidate seeking nomination by any other political party; and to vote for the candidates for nonpartisan nomination or election.

(H) It shall have separate voting devices for candidates and questions, which shall be arranged in separate rows or columns. It shall be so arranged that one or more adjacent rows or columns may be assigned to the candidates of each political party at primary elections.

(I) It shall have a counter, or other device, the register of which is visible from the outside of the machine, and which will show at any time during the voting the total number of electors who have voted; and also a protective counter, or other device, the register of which cannot be reset, which will record the cumulative total number of movements of the internal counters.

(J) It shall be provided with locks and seals by the use of which, immediately after the polls are dosed or the operation of the machine for an election is completed, no further changes to the internal counters can be allowed.

(K) It shall have the capacity to contain the names of candidates constituting the tickets of at least five political parties, and independent groups and such number of questions not exceeding fifteen as the secretary of state shall specify.

(L) It shall be durably constructed of material of good quality in a neat and workerlike manner, and in form that shall make it safely transportable.

(M) It shall be so constructed that a voter may readily learn the method of operating it, may expeditiously cast a vote for all candidates of the voter's choice, and when operated properly shall register and record correctly and accurately every vote cast.

(N) It shall be provided with a screen, hood, or curtain, which will conceal the voter while voting. During the voting, it shall preclude every person from seeing or knowing the number of votes registered for any candidate or question and from tampering with any of the internal counters.

(O) It shall not provide to a voter any type of receipt or voter confirmation that the voter legally may retain after leaving the polling place.

(P) On and after the first federal election that occurs after January 1, 2006, unless required sooner by the Help America Vote Act of 2002, if the voting machine is a direct recording electronic voting machine, it shall include a voter verified paper audit trail.

Before any voting machine is purchased, rented, or otherwise acquired, or used, the person or corporation owning or manufacturing that machine or having the legal right to control the use of that machine shall give an adequate guarantee in writing and post a bond in an amount sufficient to cover the cost of any recount or new election resulting from or directly related to the use or malfunction of the equipment, accompanied by satisfactory surety, all as determined by the secretary of state, with the board of county commissioners, guaranteeing and securing that those machines have been and continue to be certified by the secretary of state in accordance with section 3506.05 of the Revised Code, comply fully with the requirements of this section, and will correctly, accurately, and continuously register and record every vote cast, and further guaranteeing those machines against defects in workership and materials for a period of five years from the date of their acquisition .

3515.08 Election contest.

(A) Except as otherwise provided in this division, the nomination or election of any person to any public office or party position or the approval or rejection of any issue or question, submitted to the voters, may be contested by qualified electors of the state or a political subdivision. The nomination or election of any person to any federal office, including the office of elector for president and vice president and the office of member of congress, shall not be subject to a contest of election conducted under this chapter. Contests of the nomination or election of any person to any federal office shall be conducted in accordance with the applicable provisions of federal law.

(B) In the case of an office to be filled or an issue to be determined by the voters of the entire state, or for judicial offices higher than that of court of common pleas, or for an office to be filled or an issue to be determined by the voters of a district larger than a county, a contest shall be heard and determined by the chief justice of the supreme court or a justice of the supreme court assigned for that purpose by the chief justice; except that, in a contest for the office of chief justice of the supreme court, the contest shall be heard by a justice of the supreme court designated by the governor.

(C) In the case of all other offices or issues, except judicial offices, contests shall be heard and determined by a judge of the court of common pleas of the county in which the contest arose. In the case of a contest for a judicial office within a county, the contest shall be heard by the court of appeals of the district in which that county is located. If any contestant alleges prejudice on the part of the judges of the court of appeals or the court of common pleas assigned to hear a contest, the chief justice of the supreme court, upon application of any such contestant and for good cause shown, may assign judges from another court to hear the contest.

3515.09 Filing election contest petition.

A contest of election shall be commenced by the filing of a petition with the clerk of the appropriate court signed by at least twenty-five voters who voted at the last election for or against a candidate for the office or for or against the issue being contested, or by the defeated candidate for said nomination or election, within fifteen days after the results of any such nomination or election have been ascertained and announced by the proper authority, or if there is a recount, within ten days after the results of the recount of such nomination or election have been ascertained and announced by the proper authority. Such petition shall be verified by the oath of at least two such petitioners, or by the oath of the defeated candidate filing the petition, and shall set forth the grounds for such contest.

Said petition shall be accompanied by a bond with surety to be approved by the clerk of the appropriate court in a sum sufficient, as determined by him, to pay all the costs of the contest. The contestor and the person whose right to the nomination or election to such office is being contested, to be known as the contestee, shall be liable to the officers and witnesses for the costs made by them respectively; but if the results of the nomination or election are confirmed or the petition is dismissed or the prosecution fails, judgment shall be rendered against the contestor for the costs; and if the judgment is against the contestee or if the results of the nomination or election are set aside, the county shall pay the costs as other election expenses are paid.

3515.13 Contest of election involving recount.

If any contest of election involves a recount of the ballots in any precincts, the court shall immediately order the ballots of the precincts in which the recount is demanded to be sent to the court in such manner as the court designates, and such court may appoint two master commissioners of opposite political parties to supervise the making of the recount. The attorneys representing the contestor and the prosecuting attorney of the county or the attorney general or one of the attorney general's assistants representing the contestee shall be present at all hearings on such recount. Such commissioners shall receive ten dollars each per day and their actual traveling expenses when approved by the presiding judges. The compensation of such clerks as are deemed necessary by the court shall be determined by the court on the basis of similar compensation in other public offices for like work. Both the contestor and contestee may appoint one observer who shall be allowed to see all ballots and tally sheets and observe the recount. If the court finds that the difference in the count from the original count by the election authorities was the result of fraud, gross negligence, or willfulness on the part of any election officer or other person, the court shall forthwith transmit a copy of its decision and of the evidence to the prosecuting attorney of the county in which the fraud or gross negligence was found with directions to present the same to the next grand jury in the county or to the attorney general, in the case of state or federal offices, with directions to prosecute the cases on behalf of the state.

3515.14 Judgment on contest.

Upon completion of the trial of a contest of election, the court shall pronounce judgment as to which candidate was nominated or elected or whether the issue was approved or rejected by the voters; except that in the case of the contest of election of a member of the general assembly such judgment shall not be pronounced by the court but a transcript of all testimony taken and all evidence adduced in such contest shall be filed with the clerk or executive secretary of the branch of the legislative body to which the contestee was declared elected, which shall determine the election and qualification of its own members.

Any person declared nominated or elected by the court shall be entitled to his certificate of nomination or election. A certified copy of the order of such court constitutes such certificate. If the judgment is against the contestee or incumbent and he has already received a certificate of nomination or election, the judgment of the court shall work a cancellation of such certificate.

If the court decides that the election resulted in a tie vote, such decision shall be certified to the board of elections having jurisdiction and said board shall publicly determine by lot which of such persons shall be declared elected. If the court finds that no person was elected, the judgment shall be that the election be set aside.

3515.15 Appeal to Supreme Court.

The person against whom judgment is rendered in a contest of election may appeal on questions of law, within twenty days, to the supreme court; but such appeal shall not supersede the execution of the judgment of the court. Such appeal takes precedence over all other causes upon the calendar, and shall be set down for hearing and determination at the earliest convenient date. The laws and rules of the court governing appeals apply in the appeal of contested election cases. If the judgment of the lower court is affirmed, the supreme court shall order the judgment of such lower court to be enforced, if the party against whom the judgment is rendered is in possession of the office.